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REPORTS
OF
CASES ARGUED AND ADJUDGED
IN THE
Court of Appeals of Maryland.

WILLIAM T. BRANTLY,

STATE REPORTER.

VOLUME 109.

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NAMES OF THE JUDGES, ETC.

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MARYLAND REPORTS.

October Term 1908 and January Term 1909.

COUNTY COMMISSIONERS OF SOMERSET COUNTY vs. POCOMOKE BRIDGE COMPANY.

Constitutional Law—Title of Statute—Acquiescence in Unconstitutional Law—Invalidity of One Part of a Statute Rendering Invalid Another Part.

The title of the Act of 1865, Chap. 14, is "An Act to incorporate the Pocomoke Bridge Company." The statute empowered the company to build a bridge across the Pocomoke River in Worcester and Somerset Counties. Section 12 of the Act required the County Commissioners of Somerset County to pay annually to the Bridge Company the sum of six hundred dollars, and the County Commissioners of Worcester to pay annually to it the sum of seven hundred dollars. *Held*, that this section is invalid because in conflict with Constitution, Art. 3, Sec. 29, which prescribes that the subject of every law shall be described in its title. No one could infer from the title of this Act that any such legislation as this was contemplated by it.

The fact that payments have been made by County Commissioners for a number of years in pursuance of a statute, does not operate to estop them from questioning its validity.

When one section of a statute is void because in conflict with a Constitutional provision, another section, which is so connected with that section that it would not have been enacted as an independent provision, is likewise invalid, but the remaining part of the statute which is not inseparably connected with those two sections will be upheld.

The Act of 1865, Chap. 14, incorporating the Pocomoke Bridge Company, between Somerset and Worcester Counties, provided in Section 11, that the residents of those two counties and all non-resident taxpayers of those counties should pass over said bridge free of toll, but that other persons using it should pay

certain rates. Sec. 12 provided that the County Commissioners of those two counties should pay certain sums annually to the Bridge Company. *Held*, that since it is obvious that the exemption from the payment of tolls was given to the residents of those counties by section 11 in consideration of the payments directed to be made by section 12, the fact that section 12 is invalid, because in conflict with the Constitutional provision requiring the subject-matter of every law to be set forth in its title, also renders invalid section 11, because that section is inseparably connected with section 12; but the remaining part of the Act is valid.

Decided November 12, 1908.

Appeal from the Circuit Court for Somerset County
(LLOYD, J.)

The cause was submitted to BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON and HENRY, JJ., on briefs by:

Miles & Stanford and H. Fillmore Lankford for the appellant.

Melvin & Handy for the appellee.

BOYD, C. J., delivered the opinion of the Court.

This is a suit by the Pocomoke Bridge Company, a corporation incorporated by Chapter 14 of the Acts of 1865, against the County Commissioners of Somerset County, to recover six hundred dollars, claimed to be due under Section 12 of that Act. A demurrer to the declaration was overruled by the Court below and the defendant then filed six pleas, in the first of which is set out the charter of the Company in full, and all of them allege either that the whole Act is unconstitutional and null and void, or that Section 12 is. Some of them assign reasons for so alleging, while others do not—the principal ground relied on being that the title to the Act is

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not sufficient, particularly in so far as the provisions contained in Section 12 are concerned. A demurrer to the pleas was sustained and the general issue plea of not guilty was filed. The case was submitted to the Court, without the intervention of a jury, and resulted in a verdict for the plaintiff. During the trial an exception was taken to the admission of Section 12, on the ground that it is unconstitutional and void. This appeal was taken from the judgment on the above-mentioned verdict. We do not deem it necessary to pass on the demurrers and the exception separately, but will proceed at once to what we regard the important question in the case.

It involves Section 29 of Article 3 of the Constitution, or more properly speaking Section 28 of Article 3 of the Constitution of 1864, which was in force when the Act of 1865 was passed. The provision in question is however the same in both—"every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." The title of the Act is: "An Act to incorporate the Pocomoke Bridge Company." The Act names seven persons as commissioners to receive subscriptions to the capital stock, "to construct a bridge across the Pocomoke River, in Worcester and Somerset Counties, at or near the site of the present ferry, known as Steven's Ferry"—said stock being limited to \$45,000, divided into shares of \$100.00 each. As soon as one hundred shares were subscribed, the organization of the company was authorized and various provisions were made in the charter. The two important sections are as follows: "Section 11. And be it enacted, That upon the completion of said bridge, all citizens and residents of Somerset and Worcester Counties, and all non-resident taxpayers of said counties, shall pass over said bridge free of toll or charges, but all other persons shall pay such tolls and charges as the president and directors may determine, provided said tolls or charges shall not exceed the following rates: for each foot passenger, five cents; for each horse and rider, ten cents; for each carriage with one horse attached, twenty-five cents; for each carriage

with two horses attached, fifty cents; for each wagon or cart with more than two horses or oxen attached, seventy-five cents.

“Section 12. And be it enacted, That the County Commissioners for Somerset County be and are hereby required to levy annually on the assessable property of said county the sum of six hundred dollars, and to pay the same to the president and directors of said company at the end of each year, and that the County Commissioners of Worcester County be and they are hereby required to levy annually on the assessable property of said county, the sum of seven hundred dollars, and to pay over the same to the president and directors of the company aforesaid at the end of each year.”

No one can read the title to this Act without being impressed with the fact that it is exceedingly meagre, in order to justify such legislation as Section 12. The charter was granted before the General Laws provided for the incorporation of bridge companies. Since 1868 the corporation laws of this State have required companies, incorporated under the General Laws for the erection of bridges, to first obtain, in writing, the consent of the County Commissioners of the county in which the bridge is to be located, or if proposed to be erected over a stream dividing two counties to obtain the consent, in writing, of the County Commissioners of both counties, and the Commissioners are given large powers over them—including that of requiring the adjustment and revision of tolls, so as to yield not more than eight per centum net dividend. Although those provisions were not in force when this Company was chartered, there were other statutes which showed the policy of this State to be, to require great care on the part of the County Commissioners before incurring obligations in connection with the building of bridges. They were required by the Code of 1860 to advertise for sealed proposals for building or repairing a bridge, if the cost exceeded \$200.00, to award a contract to the lowest competent bidder, to demand a bond of the contractor, and, upon petition praying for a bridge to be built or repaired over a stream

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dividing two adjoining counties, the Commissioners of one county were directed to obtain the concurrence of those of the other; three Examiners were to be appointed by each, who were required to examine into the expediency of building or repairing the bridge, the place where, the plan, material and the relative portion of the cost of each county, to advertise for proposals, award the work to the lowest bidder, supervise the work, etc. An appeal was granted any citizen or citizens to the Circuit Court, if the County Commisisoners determined to build or repair any bridge, or unite with an adjoining county in building or repairing one between the two counties, etc. Those provisions are still in force, being Sections 19-38 of Art. 25 of Code of 1904.

Notwithstanding such precautions were to be taken when the County Commissioners proposed to build or repair a bridge, this Act *required* the County Commissioners of those two counties to pay to a private corporation six and seven hundred dollars, respectively, every year, although there is nothing more in the title than shown above. Was that lawfully done? Or to put the question in a more apt form: Is this constitutional provision of any value, if two counties can thus be *required* to pay annually six per centum on about one-half of the authorized capital of a private corporation, under an Act, the title to which does not make the remotest suggestion of such a provision being in the body of the Act? There have been so many decisions by this Court relating to this clause of the Constitution, that it would seem almost as if there was not room for further contention about it, but the difficulty is that the principles applicable to it must be applied to the particular facts and circumstances of each statute under consideration, and hence it is not easy to find a case exactly in point. What may be considered "one subject" in some classes of legislation may not be in others.

The "subject" of the law now under consideration, *as indicated by the title*, was the incorporation of the Pocomoke Bridge Company, while *the body of the Act* not only contained provisions which were germane and appropriate to that sub-

ject, but also this provision which required the two counties to pay the respective sums of money to the company, after it was organized and the bridge was built. If it be conceded that in a charter of a bridge company it would be germane and lawful to *authorize* a county to subscribe to its capital stock, or to authorize the company to agree with the county that on payment of a reasonable sum its citizens could use the bridge free of tolls—although not mentioned in the title—it does not follow that such a provision as that now attacked can be inserted in a charter of a private corporation, and thus *compel* a county, which is not a party to the charter, to levy and pay annually a fixed sum for the use of the bridge, without at least giving some notice of such legislation in the title. That brings us more nearly to the real question in the case—Is the subject of this Act *so described in the title* as to authorize the legislation embraced in Section 12, within the spirit and meaning of the constitutional provision? As a matter of fact, it cannot be said that the title would in the remotest degree suggest to either the County Commissioners, to any representative of Somerset County in the Legislature, or to any taxpayer of the County that the Act proposed to require the County to pay the corporation six hundred dollars, or any other sum of money, every year. If we assume that they were informed by the name that it was proposed to form a corporation to build a bridge over the Pocomoke River, there is not even anything in the title to show that the bridge was to be between Somerset and Worcester Counties, for that river extended into Worcester County for a considerable distance beyond the Somerset boundary.

In many of the cases in this Court the object of this constitutional provision has been stated, and in *Stiefel v. Maryland Institution, etc.*, 61 Md. 148, it was said of it: "Publicity and a knowledge of *the true effect and operation* of every bill brought before the Legislature are the great safeguards against ill-considered and improper legislation. The provision in question is one, among many others in the Constitution, designed to promote those objects." In *Kafka v. Wilkinson*, 99

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Md. 241, it was said, and has been several times since repeated, that its purpose and object "have been declared to be two-fold; the *first* is to prevent the combination in one Act of several distinct and incongruous subjects; and the *second* is, that the Legislature and the people of the State may be fairly advised of the *real nature* of pending legislation." In one of the latest cases (*Fout v. Frederick Co.*, 105 Md. 563) JUDGE BURKE quoted from Cooley's Con. Lim. (3rd Ed.) 158, that the purpose of this provision is: "*First*, to prevent *Hodge Podge* 'log rolling' legislation; *second*, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles give no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, *third*, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire."

While courts should be very cautious in striking down Acts of the Legislature, they must protect the public and the members of the Legislature themselves from being imposed on by the violation of constitutional provisions, intended to furnish them protection. A title to an Act should not only fairly indicate the general subject of the Act, but should be sufficiently comprehensive in its scope to cover, to a reasonable extent, all its provisions and must not be misleading by what it says or omits to say. Applying these and the above principles to Section 12 of this Act, we cannot hesitate to declare it invalid. If it was actually known by the authorities and people of the two counties, before it was passed, this conclusion may possibly work a hardship on the stockholders of the company, to now strike it down, but as we are called upon to determine the question we must do so regardless of the consequences, however much we may regret that some injury may ensue to innocent persons. The long acquiescence by the county, in paying the amount for so many years, cannot estop the present County Commissioners from raising the question, and thereby

make an unconstitutional law in effect constitutional. They are public servants whose duty is to protect the public, and they have no right to pay out the money of the County unless authorized to do so. It was said by Judge Pearce in *Arnsperger v. Crawford*, 101 Md. 258: "It was urged in argument that this statute has been silently acquiesced in so long that it should not now be disturbed. This argument was urged in *Sadler v. Langham*, *supra* (34 Ala. 332), but the Court replied, justly as we think, that it was never too late to re-establish constitutional rights, the observance of which has been silently neglected; and we may add that it is the infringement of the constitutional rights of the few in minor matters which leads to the disregard of the rights of the body of the people in matters of graver import, and that no constitutional right can be so unimportant as to justify a court in failing to enforce it, when its aid is invoked for that purpose." It is said in 26 *Am. & Eng. Ency. of Law*, 575, that "Long acquiescence in the constitutionality of an Act in respect of its title is entitled to much weight in determining the sufficiency of the title." In doubtful cases that may be properly considered just as we may consider the circumstances under which a provision is adopted, the construction placed on it by the Legislature, the framers of the Constitution and the people, as we said in *Bonsal v. Yellott*, 100 Md. 481, but in this case we can have no doubt as to the unconstitutionality of this provision, and hence must declare it void.

There is, however, another branch of this case to be determined. It is well settled that it is not necessary, or proper, to strike down an entire Act because one provision is void, "unless the provisions are so connected together in subject-matter, meaning or purpose, that it cannot be presumed the Legislature would have passed the one without the other." 26 *Am. & Eng. Ency. of Law*, 579. That principle has been announced by this Court over and over again, and it has been applied to cases in which the valid and void provisions were in the same section of the Act. *Mayor, etc., of Hagerstown v. Dechert*, 32 Md. 369; *Steenken v. State*, 88 Md. 708. There can,

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therefore, be no possible difficulty in the way of declaring Section 12 unconstitutional and in upholding other sections, unless it is so inseparably connected with the others, or some of them, as to raise the presumption that the Legislature would not have passed the one without the other. It is apparent that it would work a great hardship on the appellee to strike out Section 12 and retain the part of Section 11 which authorizes all citizens, residents and non-resident taxpayers of the two counties to pass over the bridge free. It is impossible to read those two sections without reaching the conclusion that the Legislature gave that right to the people and taxpayers of the two counties by reason of the provisions in Section 12, and that Section 12 was passed in consideration of the provision in Section 11. No other explanation can be given for the passage of the provisions referred to in the two sections, and the fact that Section 11 not only gave the citizens and residents of the two counties, but also the non-resident taxpayers, the right to use the bridge free, strengthens that conclusion, for surely the Legislature would not have made the exemption in favor of the non-resident taxpayers, had it not imposed the burden on them of contributing, as taxpayers, to the payments provided for in Section 12. If the provision in Section 11 had been inserted in Section 12 so as to read: "And be it enacted, That in consideration of said company passing all citizens, residents and non-residents taxpayers of said counties over said bridge free of toll or charges, the County Commissioners of Somerset County be and are hereby required to levy annually on the assessable property," etc.—using the language of what is now Section 12—there could be no doubt that the exemption from payment of toll or charges would have fallen with the rest of the section, and as that is unquestionably the meaning of the two sections, as they now stand, we are of opinion that the provision referred to in Section 11 must fall with Section 12.

The rest of the Act is applicable to the incorporation of the Company—to what the title describes the Act to be—and after a lapse of over forty years, during which time much

of the stock of the Company has doubtless changed hands, it would be manifest injustice to strike down the whole charter, but it would be equally unjust to strike down the section that was clearly intended to provide compensation for the privileges granted in the other section, and yet permit the latter to remain in force, so as to continue those privileges. This conclusion will permit the appellee to charge such toll as the president and directors may determine—not to exceed the rates named in the charter. As the charter is subject to amendment, those rates can be reasonably regulated by the Legislature, if deemed excessive or unreasonable.

Inasmuch as we have reached the conclusions already announced, it is not necessary to discuss the question whether the Legislature could validly make such provisions as are contained in Sections 11 and 12, although we do not understand it to be denied by the appellant that they were within the power of the Legislature. The question involved in this case is not the power to so legislate, but whether the power was validly and constitutionally exercised, and we therefore will not prolong this opinion by entering into a discussion of the power of the Legislature in such matters. Nor are we called upon to consider other questions raised or suggested.

It follows from what we have said that the judgment must be reversed and, as there can be no recovery, we will not award a new trial.

Judgment reversed without awarding a new trial, the appellee to pay the costs above and below.

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Syllabus.

CHARLES F. MILLER ET AL. vs. COSMIC CEMENT
TILE AND STONE COMPANY.

Divisibility of Contract by Corporation Valid in Part and Invalid in Part—Contract of Corporation Terminated by Insolvency—Compensation for Services Rendered.

A contract by a corporation to issue a certain number of shares of stock to a person in consideration of his transfer of property to it, and to pay that person a certain sum of money for services to be rendered, is divisible, and if the agreement to issue the shares of stock is invalid, because not ratified by the stockholders in the manner prescribed by statute, the other agreement as to employment is valid.

When the insolvency of a corporation renders impossible the further performance of a contract of employment, the person rendering the services is entitled to compensation to the extent of his part performance, according to the contract price.

A corporation was organized to make cement, etc., according to a secret formula and process invented by one W., who agreed to transfer the same to the company in consideration of ninety thousand dollars of its capital stock, and of ten thousand dollars as compensation to W. for his services to the company as chemist, of which two thousand dollars was to be paid in cash and two hundred dollars per month thereafter until said sum should be fully paid. This agreement was made with the Board of Directors only. Code, Art. 23, Sec. 69, provides that subscriptions to the capital stock of a corporation in property shall not be received unless previously authorized by the stockholders in general meeting. After W. had served as chemist in pursuance of the agreement for some months, the company became insolvent, and upon a distribution of its assets, W. claimed to be entitled, as a creditor, to the extent of ten thousand dollars, less payments made to him. *Held*, that although the agreement to issue the shares of stock to W. was invalid because in violation of the statute, yet the agreement to employ him as chemist was valid.

Held, further, that W. is entitled to claim as a creditor for the sum of two thousand dollars, which was to be paid him in cash, upon beginning the services, and for the stipulated salary of two hundred dollars per month until the receiver was appointed, less amount paid him on account.

Held, further, that of this total claim W. is entitled to the full amount of salary for three months before the appointment of the receiver, and that on the balance of his claim he should be allowed a dividend as a general creditor.

Decided November 14th, 1908.

Appeal from the Circuit Court No. 2 of Baltimore City (GORTER, J.)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and HENRY, JJ.

Edwin H. Brownley (with whom was *Martin G. Kenney* on the brief), for the appellants.

B. B. Shreeves, for the appellee, submitted the cause on his brief.

SCHMUCKER, J., delivered the opinion of the Court.

This is an appeal from an order of Circuit Court No. 2 of Baltimore City sustaining exceptions to an auditor's account and directing its restatement in a designated manner. The account distributed the assets of the appellee company which had, by a previous order in this case, been placed in the hands of a receiver for liquidation because of its insolvency. The only claim involved in the exceptions is the one filed by Dr. P. B. Wilson, Jr., for a balance of \$9,415, alleged to be due on account of salary agreed to be paid to him as chemist.

It appears from the record that Dr. Wilson after several years of experimenting had made what was believed to be a new and useful discovery in the production of cement, tile and stone. During these experiments he had received financial

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and practical assistance from James F. Morrison and Morrill N. Packard. In July, 1904, the appellee company was incorporated with a capital stock of \$200,000, under the general laws of the State, by Morrison, Packard, Wilson and others for the purpose of manufacturing and dealing in cement, tile and stone to be made after the formula discovered by Dr. Wilson. About \$17,800 of the stock was subscribed for by persons other than Dr. Wilson, and those subscriptions were eventually paid up to the company or its receiver.

On July 26th, 1904, at the first corporate meeting of the company, Dr. Wilson made to it in writing a proposition to "sell, dispose of and transfer" his discovery and the secret formula embodying it, with the sole and exclusive right to the use thereof, to be paid for upon the following terms, as set forth in his offer:

"The terms upon which I offer to sell and transfer the aforesaid discovery and formula to your company are that I shall receive the sum of one hundred thousand (\$100,000) dollars for the same, and that your company shall enter into a contract to employ me in the capacity of Chemist for said company at such a salary as shall be determined upon to be fair compensation for my service, taking into consideration the earnings thereof.

"I agree to take as part payment of said sum of one hundred thousand (\$100,000) dollars, ninety thousand (\$90,000) dollars' worth of the capital stock of your company at its par value, and the balance of ten thousand (\$10,000) dollars in such cash payments and as promptly and at such times as will not seriously interfere with the successful operations of your company financially.

"I agree that said cash sum of ten thousand dollars (\$10,000) shall be in lieu as salary as Chemist, until said sum has been fully paid, as follows: Two thousand dollars (\$2,000) in cash upon the execution of said transfers and agreements and two hundred dollars per month (\$200.00) thereafter until said sum of ten thousand (\$10,000) dollars has been

fully paid, said payments to commence on the first day of August, 1904."

It is apparent from the terms of this proposed disposal of the discovery and formula to the company in consideration to the extent of \$90,000, of the issue by it of its capital stock, as well as from the manner of its attempted acceptance on the part of the company that the transaction was intended to be a subscription by Dr. Wilson to that amount of its stock to be paid for in property, consisting of the discovery and formula, under the provisions of Sec. 69 of Art. 23 of the Code.

The proposition thus made was referred by the company to a committee of three directors for investigation, with instructions to report to a meeting of the *board of directors*, to be held on July 28th, "to consider the propriety of making said purchase and to fix the terms upon which it should be made." At the meeting of the *board of directors* held on July 28th, this committee reported that after having "examined carefully the merits, worth, use and adaptability of the discovery and formula offered by Dr. Wilson, both as to its scientific and commercial values," they found it to be of great present and prospective value, and they recommended its purchase upon the terms set forth in the offer of sale made by him. The offer was then formally accepted by a resolution of the *board of directors*, which also authorized the president of the company to do all acts on its behalf requisite to the consummation of the transaction.

The company having failed to pay the bonus tax to the State prior to the meetings of July 26th and 28th, the tax was paid and the proceedings of the *board of directors* at those two meetings were formally ratified at a *meeting of that board* held on September 1st, 1904. The record, however, contains no evidence that the acquisition by the company of Dr. Wilson's discovery and formula in return for the issue to him of \$9,000 of its stock was ever authorized by "*its stockholders assembled in general meeting pursuant to a call to consider the propriety of receiving it,*" as is required by

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Sec. 69 of Art. 23 of the Code as a condition precedent to the validity of the acceptance by such corporations of any species of property in payment of subscriptions to any part of their capital stock.

Neither a written transfer nor an actual delivery of the formula nor a disclosure of its contents was ever made by Dr. Wilson to the company, nor were the \$90,000 of stock ever actually issued to him, but the company had the benefit of the use of the process described in the formula in its manufacturing operations, which were conducted under the direction and supervision of the Doctor himself as its chemist. The formula remained in a safe deposit box in the Drovers and Mechanics National Bank in the joint custody of Morrison, Dr. Wilson and Packard, where it had been for some time prior to the organization of the company. There was an understanding between the parties interested in the company that no certificates of stock should be issued until after the lapse of a year from its incorporation.

The company having thus obtained the use and benefit of Dr. Wilson's process established a factory and plant and endeavored, under his supervision, to manufacture and sell the products to which it was believed to be adapted. The material produced at the factory proved to be unsaleable and of no market value and the company became financially embarrassed, by its manufacturing enterprise, to such a degree that its insolvency supervened and it was put in the hands of a receiver for liquidation, on the bill of complaint of a creditor, by an order of Court passed in this case on June 12th, 1905.

During the progress of the liquidation of the company's affairs, Dr. Wilson filed in the case his claim, as a creditor of the company, which forms the subject of the present controversy. That claim is stated upon the theory that the Doctor is, under his agreement with the company, entitled to \$10,000 salary as its chemist, and the alleged balance of \$9,415 in controversy is arrived at by allowing credit on the \$10,000, for several payments made thereon, amounting

to \$585. The auditor in his account distributing the net assets in the hands of the receiver treated Dr. Wilson as a general creditor to the extent of \$9,415 and interest, and allowed him a dividend thereon.

To that allowance exceptions were filed by the appellants, William Hollingsworth, who is a creditor of the company, and James F. Morrison, who is both a creditor and stockholder. The exceptions go, among other things, to the validity of the claim and of the contract upon which it is founded. The learned Judge below sustained the exceptions and directed the statement of a new account allowing a dividend to Dr. Wilson as a general creditor "upon two thousand dollars as of the date of September 2nd, 1904, and a dividend upon the further sum of \$2,200 (being eleven months at the rate of \$200 a month from August 1st, 1904), less the sum of \$585 to be deducted from the said sum of \$2,200 at the times when the amounts were paid which constitute the sum of \$585." We think neither the theory adopted by the auditor in stating his account, nor the conclusion reached by the Court below in its action upon the exceptions, was entirely correct.

We will first consider whether the attempted contract between Dr. Wilson and the company ever became binding upon the parties to it and, if so, to what extent. Its most essential feature, consisting of the effort to pay for \$90,000 of the capital stock of the company by a transfer to it of the formula for the manufacture of the articles therein mentioned, was void because of the failure on the part of the company to comply with the imperative and unequivocal requirements of the statute law relating to the issue of stock by corporations.

Sec. 69 of Art. 23 of the Code provides that "subscriptions to the capital stock of such of said corporations as have capital stock may be made in land or other property at a valuation agreed upon between the corporation and the subscriber, where the property so subscribed shall be such as it is proper that the said corporation shall own for the advance-

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ment of the purposes for which it was incorporated, but such subscriptions shall not be otherwise received, *nor shall they be so received unless the same shall have been previously authorized by the stockholders assembled in general meeting*, pursuant to a call to consider the propriety of receiving the said subscription and of fixing the terms upon which it shall be received." It was beyond the power of the appellee to make a valid contract to receive property of any kind in payment for any part of its capital stock in plain violation of the express conditions imposed upon it by that Section. *Baile v. Calvert College*, 47 Md. 117; 9 Cyc. 475.

Although the action of the board of directors of the company was ineffectual to authorize the acceptance of the discovery and formula of Dr. Wilson in payment for capital stock, it was not necessarily inadequate to make a valid contract for his employment as chemist, especially when it was followed up by an acceptance on the part of the company of his services in that capacity. The proposal of Dr. Wilson to the company was in a certain sense a twofold one. He offered to transfer to it his discovery and formula and also to enter its service as chemist, and he exacted two things in return, the issue to him of \$90,000 in stock and the payment to him of \$10,000. Although his proposal to the company in one place mentions \$100,000, as a gross consideration for the several things which he offered to do, the last clause distinctly states "that the said cash sum of ten thousand dollars (\$10,000) shall be in lieu of salary as chemist until said sum has been fully paid."

We think the contract attempted to be made by the acceptance of this proposal should be held, upon a fair construction of its terms, to have been divisible, and the portion of it relating to the employment of the Doctor by the company as its chemist be held to be binding upon the parties, although the part relating to the issue of stock and the transfer of the discovery and formula must, for the reasons already stated, be held to have been void. Even if the divisibility of the contract be held to be doubtful, the Doctor would still be entitled to re-

cover upon a *quantum meruit* for the services as chemist which were actually rendered by him and accepted by the company up until the appointment of the receiver. We have repeatedly held that where the work provided for in a contract has been done by the party required thereby to do it and his work has been accepted by the other party a recovery therefor may be had on the common counts in assumpsit and the contract price will be treated as the measure of damages. *Ridgely v. Crandall*, 4 Md. 435; *Appleman v. Michael*, 43 Md. 273; *City & Suburban Ry. Co. v. Basshor*, 82 Md. 405; *Walsh v. Janvey*, 85 Md. 240; *Southn. Bldg. Assn. v. Price*, 88 Md. 155.

In the last-mentioned case, we held that when the plaintiff had performed his part of a contract with a corporation until the appointment of a receiver for the corporation rendered the further performance of the contract by him impossible, he was entitled to recover to the extent of the part performance made by him and accepted by the corporation. We have also held in a series of other cases that, when the appointment of a receiver for a building association rendered impossible the further performance by it of the contracts with its members, the contracts were thereby terminated and the members were entitled to be allowed by the auditor, in the liquidation of the assets of the corporation, for the value of the performance by them of their contracts until the appointment of the receiver. *Low St. Bldg. Assn. v. Zucker*, 48 Md. 448; *St. Peter's Bldg. Assn. v. Jaecksch*, 51 Md. 205; *Hampstead Bldg. Assn. v. King*, 58 Md. 280; *Preston v. Woodland*, 88 Md. 163.

The appointment of the receiver in the present case having rendered impossible the further performance by Dr. Wilson of his duties as its chemist, the further question remains as to the measure of compensation to be allowed him for his previous services in that capacity.

By the terms of the contract \$2,000 were to be paid in cash "upon the execution of the transfers and agreements" called for by his proposal and \$200 per month thereafter. As

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we have held the acceptance of his proposal by the board of directors of the company to be sufficient, in connection with the proposal,* to constitute a valid contract of employment as chemist, we think that such acceptance should in equity be regarded as the "execution of the agreement" referred to in the proposal, *quoad* that employment, and that the \$2,000 then to be paid should be included in Dr. Wilson's claim. The agreement to pay him so large a cash sum on entering the employment was an unusual one, but he testified without contradiction that it was demanded by him because he was required to abandon his practice in order to devote himself exclusively to the service of the company and that he had explained that matter to the board of directors.

He appears from the record to have served the company as chemist for the eleven months prior to the receivership, for which \$2,200 would be due him under the terms of the contract. We therefore think that Dr. Wilson's claim should be recognized as valid to the extent of \$4,200 less the \$585, admitted to have been paid him on account, making his actual claim amount to \$3,615, with a due proportion of interest. Of this claim \$600 should be allowed in full as salary accruing within three months anterior to the appointment of the receiver and on the balance of the claim he should be allowed a dividend as a general creditor of the company.

The order appealed from will be reversed and the case remanded for further proceedings in accordance with this opinion.

Order reversed and cause remanded for further proceedings in accordance with this opinion, the costs of the appeal to be paid out of the fund in the hands of the receiver.

BRUNO RICHTER ET AL. vs. PHILIP L. POE ET AL.

*Wagering Contract—Purchase of Shares of Stock on Margin—
When Valid—Burden of Proof—Stop Order to Sell Given
to Stock Broker—Insufficient Evidence of Agree-
ment to Carry Shares of Stock.*

If, under the semblance of a contract for the purchase of shares of stock at a future time, the intention of the parties is that the shares shall not be delivered and paid for, but that one party shall pay to the other the difference between the contract price and the market price at the date of settlement, then such agreement is a gambling or wagering contract. It is consequently illegal and no action lies upon it.

But a speculative contract for the purchase of stocks, when the buyer deposits a margin as security for his performance of the contract, is not necessarily a wagering contract.

The relation between broker and customer when goods are purchased on margin set forth.

A stop order is a direction given by the purchaser to the broker to the effect that if the stock touches the price named in the order, while it is being held, the broker shall sell it at the best available price; but it does not impose an obligation upon the broker to hold it until it reaches that price.

When a party alleges that the contract by which he purchased shares of stock from a broker on a margin was a gambling transaction, and seeks to avoid the same, the burden of proof is upon him to establish that allegation.

Plaintiff ordered a stock broker, the defendant, to purchase certain shares of stock, and deposited a sum of money as a margin on the transaction, and also executed a mortgage to the broker as further security. There was no agreement between the parties that the shares were not to be delivered. The broker purchased the shares for the plaintiff and was ready to deliver the same upon demand. The price declined on the market, and, upon plaintiff's failure to pay for and receive the shares or to furnish additional margin, after notice, the broker sold the same on the stock exchange. Plaintiff then filed the bill in this case alleging that the purchase of the stock was a wagering contract, and also that the defend-

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ant had agreed to carry the stock for the plaintiff until it should decline to forty-five dollars per share, in consideration of which agreement plaintiff had executed the mortgage, but that the defendant, in violation of this agreement, had sold the stock at fifty-six dollars per share. The bill prayed that the mortgage be cancelled and that the defendant be required to repay the plaintiff the money deposited as a margin. *Held*, that the evidence fails to support the allegations of the bill or to show that the defendant had agreed to carry the stock for the plaintiff as therein alleged.

Decided December 2nd, 1908.

Appeal from the Circuit Court No. 2 of Baltimore City
(GORTER, J.)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and HENRY, JJ.

William S. Bryan, Jr. (with whom was *Edwin Burgess* on the brief), for the appellants.

J. Cookman Boyd, Wm. Milnes Maloy and *George M. Brady*, for the appellees, submitted the cause on their separate briefs.

BURKE, J., delivered the opinion of the Court.

This case comes before us on appeal from a decree of the Circuit Court No. 2 of Baltimore City dismissing the appellants' bill of complaint filed in that Court. Bruno Richter, who is engaged in the chattel loan business in Baltimore City, had certain stock transactions during the months of August and September, 1907, with the appellees, who are stock brokers, and also the agents in Baltimore City of the New York brokerage firm of T. A. McIntyre & Co. The suit involves an inquiry into the nature of certain transactions concerning five hundred shares of stock of the Amalgamated Copper Company, upon which Bruno Richter had

paid to the appellees the sum of forty-two hundred dollars, and had given a mortgage on certain property in Baltimore County for ten thousand dollars as additional security in part payment of the purchase price of the stock. The specific relief prayed for in the bill is: *a.* That the appellees may be decreed to repay to Richter said sum of forty-two hundred dollars with interest; *b.* That they may be decreed to surrender to him the mortgage note of ten thousand dollars to be cancelled; *c.* That they may be decreed to release the mortgage and be enjoined from attempting or proceeding to sell the mortgaged property under the powers contained in the mortgage.

The two grounds upon which this relief is prayed for are: First, that the transactions respecting the purchase and sale of the stock were mere gambling, or wagering, contracts; secondly, that the appellees had agreed with Richter to carry the stock until it declined to forty-five dollars per share, and that in violation of their agreement they sold the stock at fifty-six dollars per share, and it is contended that because of this violation of the agreement Richter had a right to rescind the contract, and demand the release of the mortgage and recover the money paid by him to the appellees.

The bill alleged that while the transaction between him and the appellees was in the form of a purchase of said stock, it was in truth and in fact a mere gambling wager, there being no intention or belief on the part of himself or the appellees that the stock for the purchase of which orders had been given should ever actually be delivered to him, but that the sole purpose, as was well known to the appellees, was that there should be an accounting and settling of the differences as the stock rose or fell in market price, or as the appellant won or lost on his wagers; that the only expectation of all parties to the transaction was that when the wagering transactions were completed the settlement and adjustment should be made on the differences between the market prices of the stock at the time the orders to buy the same were given. That because of the breach of the contract by the appellees

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to carry the stock to forty-five dollars per share, the reasonable expectation of benefit which Richter had when he delivered the money and the promissory note to the defendants had been disappointed by their wrongful conduct in selling the stock before it declined to that figure, and that he had served a written demand upon the defendants to return the money and note to him and to release the mortgage, which they had declined to do.

These grounds, upon which the relief prayed for rests, are explicitly denied by the answer. It admits that among the transactions had between themselves and Richter there were purchases of Amalgamated Copper Stock to the extent five hundred shares, but they deny that the transactions were a mere gambling wager, or that there was no intention or belief on the part of Richter, or the defendants that the stock for the purchase of which orders had been given should ever be delivered to him; they deny that the sole purpose was that there should be an accounting and settlement of the differences as the stock rose and fell in price; they deny that the transactions were wagers on the part of Richter; they deny that the only expectation of all the parties to the transactions was that they should be completed as set forth in the bill, and they alleged that they stood ready and willing to deliver to Richter all shares of stock that he had purchased.

From this statement of the pleadings it will be perceived that the two important questions presented for decision are: First, were the transactions mere wagering, or gambling, contracts, and therefore void? Secondly, was there an agreement between the parties to the effect that the appellees, in consideration of the execution and delivery of the promissory note and mortgage, would carry the stock until it should decline to forty-five dollars per share?

It is settled that "where the contract is that in case of a decline in the market price of the stock, the purchaser is to pay the difference between the contract price and the market price, and there is no intention that he shall receive and pay for the stock itself, the dealing is a gambling contract, and

the law does not permit an action to be maintained upon it." *Billingslea v. Smith*, 77 Md. 519; *Stewart v. Schall*, 65 Md. 290; *Cover v. Smith*, 82 Md. 614. Such a contract is null and void. *Dryden v. Zell & Merceret*, 104 Md. 345. It is said in *Irwin v. Williar*, 110 U. S. 508, that: "The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and if, under guise of such a contract, the real intent be merely to speculate in the rise and fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void." If it appear that the transaction is a gambling contract, the fact that it is clothed in legal form will not avail. The Court will look through the mere guise in which it is attempted to be conducted, and will declare its true nature.

But there is a broad and well-recognized distinction between a gambling contract and a speculative contract for the purchase and sale of stocks on margin. Such transactions are valid. The true relations which exist between the broker and the customer in such cases, in the absence of some special agreement, where the stock is purchased on margin for speculative account, are these: The broker undertakes and agrees:

1. At once to buy for the customer the stocks indicated.
2. To advance all the money required for the purchase beyond the per cent. furnished by the customer.
3. To carry or hold the stock for the benefit of the customer so long as the margin agreed upon is kept good, or until notice is given by either party that the transaction

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must be closed. An appreciation in the value of the stock is the gain of the customer, and not of the broker.

4. At all times to have, in his name and under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock.

5. To deliver such shares to the customer when required by him, upon the receipt of the advances, commissions and interest due to the broker; or,

6. To sell such shares, upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale.

Under this contract the customer undertakes:

1. To pay the margin agreed upon on the current market value of the stock.

2. To keep good such margin according to the fluctuations of the market.

3. To take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount due the broker. *Markham v. Jaudon*, 41 N. Y. 235; *Richardson v. Shaw*, 209 U. S. 365, decided by the Supreme Court of the United States, April 6th, 1908.

The first question is: Does the evidence support the appellants' contention that the transactions between them and the appellees were gambling contracts for the purchase and sale of this stock? Whether they were mere wagers, or were valid purchases and sales on margin within the rules stated, were questions to be decided upon a consideration of all the facts and circumstances in the case. In determining these questions upon the record before us, in which appears upon the material issues of facts raised by the pleadings the most direct and irreconcilable conflict of evidence, two things must be remembered: first, that the law presumes the validity of the contract and that the burden of proof was upon the appellant to satisfy the Court of the truth of the essential facts alleged in the bill as the grounds for the recovery of the money paid and for the cancellation of the mortgage note;

secondly, that the greater part of the testimony—and it is quite voluminous—was taken orally in the Court below before the Judge who decided the case. He, therefore, had the opportunity to observe the witnesses and their manner of testifying, and had the best means of deciding upon the value of their testimony. This circumstance, it is true, would not prevent this Court from reversing the decree if we found it was not warranted by the evidence; but where the question to be decided turns so largely, as it does in this case, upon the weight of testimony and the credibility of witnesses it is properly entitled to much consideration. We have examined and considered carefully the testimony appearing in the record, and have reached the conclusion that it does not sustain the contention of Bruno Richter, that the dealings had by him with the defendants with respect to the stock in question were gambling contracts; but that the transactions constituted a purchase and sale of stocks on margin.

This Court has repeatedly said that on a question depending entirely upon the evidence “no good result can possibly arise from a recapitulation of the evidence. It is enough for the Court to announce the conclusion it arrives at.” *Sterling v. Sterling*, 64 Md. 138; *Moore v. McDonald*, 68 Md. 321. Here, however, a brief examination of the evidence, dealing with its nature and purport rather than with its details, may be appropriate. It is admitted that the appellees were stock brokers, and were the Baltimore agents of the brokerage firm of T. A. McIntyre & Co. It is admitted that Bruno Richter gave orders to the appellees to purchase the stock in question on margin, and that he, at different times after the orders were given, paid to the appellees sums amounting to forty-two hundred dollars, to be used as margins on the purchase of stock. It is also admitted that the promissory note and mortgage were executed and delivered as security for further or additional margin. It is now claimed that this was a mere sham—a guise to cover up a gambling scheme in order to protect it from the denunciation of the law; that it was never intended by the parties that the stock should be bought

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or delivered by the seller, and that there was no intention on the part of either the sellers or the purchaser that the stock should ever be bought or delivered, and that the whole arrangement was in truth and in fact a mere gambling wager.

The evidence fails to make out this claim. On the contrary, it is clear and satisfactory that the transaction was strictly a purchase and sale of the stock on margin, and was conducted in the usual and accustomed way governing such transactions. The evidence of Poe and Davies and the employees produced by them at the trial, respecting the giving of the orders of purchase of the stock, is utterly inconsistent with the plaintiff's theory. It shows that the stock was actually purchased and paid for by T. A. McIntyre & Co., and could have been delivered to Richter had he paid for it. Mr. McIntyre testified that he had paid for the stock at the price shown upon the books of his firm, and that he had personal knowledge of that fact, and that any time from the date of the purchase he was ready to deliver the stock to Richter upon his paying for the same. This testimony is strongly supported by that of other witnesses and by circumstances appearing in the record, and is really uncontradicted. The stock was sold by McIntyre & Co. upon the New York Stock Exchange for fifty-six dollars per share; but before this sale was made the weight of the evidence is that a demand was made by Poe and Davies upon Richter to pay for the stock and take it up, or to put up additional margin to protect them. This he refused to do, claiming that Poe and Davies were under a contract with him to carry the stock until it should decline to forty-five dollars per share. It is a significant fact that at no time until the bill was filed did Richter claim that he and the appellees were engaged in a stock-gambling scheme. No such claim is made in the letter of his counsel to Poe and Davies, dated October 14th, 1907, in which he notified them that he considered the contract between them rescinded and made demand for the return of the money paid and the surrender of the promissory note, and the release of the mortgage, but he rested his right of rescission

exclusively upon the ground that the appellees had wrongfully and contrary to their agreement sold the stock before it had declined to forty-five dollars per share. Assuming, *ex gratia argumenti*, the truth of all the testimony produced by the plaintiff, it does not certainly appear that the transaction was a gambling one. It is not pretended that there was any express understanding that the stock was not to be actually purchased for the account of Richter, and his testimony as to what took place at the beginning of the course of dealing is so indefinite and uncertain as to be of little value upon this inquiry. It seems to be reasonably certain that Richter assumed that the transaction was a gambling one from the mere fact that he was buying and selling on margin. This is obvious from his own evidence and that of Mr. Burgess, who, when asked by the plaintiff's counsel if it was understood between himself and Richter and Poe and Davies that the settlement was to be made on differences and that there was to be no actual delivery of the stock, answered as follows: "That is the way we understood it. I want to say Mr. Poe and Mr. Davies never said to me that they would not deliver. I want to be perfectly fair, but it was understood he knew and we talked the matter over, that this was simply a margin transaction, but they never told me and I never told them— I want to be perfectly fair— Mr. Boyd: You never told them or they never told you what? Witness: I would never take the stuff, and they never told me. I said I was simply buying this on margin. I said, I want to speculate on margin when I went there. He says that it is five points on stock and three cents a bushel on wheat. I never took a turn on cotton, so I do not know what that was." It is settled by all the authorities that a speculative transaction for the purchase and sale of stock on margin does not constitute gambling. *Dryden Admr. v. Zell & Marceret*, 104 Md. 345; *Richardson v. Shaw*, *supra*.

2. Nor do we find sufficient evidence of an agreement on the part of the appellees to carry the stock until it should decline to forty-five dollars per share. There is no written

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evidence of such an agreement, and it would have been a most unwise and improvident contract for them to have made, as it might have tied up indefinitely the money invested by them in the purchase of the stock. The Court ought not to be too ready to believe they would do such a foolish thing. It is true that both Mr. and Mrs. Richter testify that Mr. Poe did so agree; but this he positively denies, and the circumstances attending the execution of the mortgage and the delivery of the instrument of writing marked Plaintiff's Exhibit No. 3 strongly support his denial. The recital in that exhibit that Richter had requested the appellees to carry the stock on margin until it should reach a certain market price evidently refers to the stop-loss order at forty-five which he gave to the appellees on the day the mortgage was delivered, and does not imply, nor was it intended to mean, that they were unconditionally bound to carry the stock for that figure. A stop order is a direction given by the purchaser to the broker to the effect that if the stock touches the price named in the order, while it is being held, the broker shall sell it at the best available price; but it does not impose an obligation upon the broker to hold it until it reaches that price. It is a measure of protection which the purchaser provides for himself against loss beyond a certain point in a fluctuating market.

We think it most probable that the claim that there existed a contract such as that set up in the bill grew out of misconception, or misunderstanding, of the meaning and effect of that order. The appellants having failed to sustain either of the grounds of relief alleged in the bill, the decree appealed against will be affirmed. We are not, however, to be understood as deciding that the breach of the contract alleged would, under the facts in this case, assuming the contract to have been proved, have entitled the appellants to the relief prayed for.

Decree affirmed with costs.

WILLIAM D. JONES, ADMINISTRATOR, vs. CHRISTINA
CRISP ET AL.

*Gift of Savings Bank Deposit to Take Effect on Death of
Donor—Testamentary Disposition.*

A woman said to the teller of a bank that she wished to deposit a sum of money in the savings department in her name, and so that in the event of her death, it should be payable to one Jones. In the book of deposit then given to her, the entry was as follows: "Frederica Crisp, in case of death payable to E. Jones." Afterwards she gave the deposit book to Jones, accompanied by declarations showing her intention that he should have the sum so deposited upon her death. Under the rules of the bank, the money could not be paid without the production of the book. *Held*, that this transaction did not constitute a valid gift *inter vivos*, since the donee did not obtain control over the fund in the lifetime of the donor, and that it is not effectual as a gift to take effect upon her death, because not executed in the manner prescribed by law for a testamentary disposition.

Decided December 9th, 1908.

Appeal from the Circuit Court No. 2 of Baltimore City
(GORTER, J.)

The cause was argued before BOYD, C. J., BRISCOE,
PEARCE, SCHMUCKER, BURKE, THOMAS and HENRY, JJ.

Robert H. Smith, for the appellant.

J. Cookman Boyd (with whom was *Frank V. Rhodes* on
the brief), for the appellees.

BRISCOE, J., delivered the opinion of the Court.

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This is a bill of interpleader, filed on the 22nd of March, 1905, in the Circuit Court No. 2 of Baltimore City by the plaintiff against the defendants, for the purpose of establishing the ownership or title to a certain deposit of twenty-five hundred dollars deposited in the savings department of the Canton National Bank of Baltimore County.

The plaintiff bank disclaimed any claim or interest in the deposit, and on the 21st of June, 1905, under and by virtue of a decree of interpleader the bank paid the sum of \$2,435.45 into Court, to the credit of the cause, to await the inquiry as to who is entitled to the fund.

The fund was claimed, first, by the plaintiff, now deceased, under the terms of the entry in the bank book of deposit, to wit, "Frederica Crisp, in case of death, payable to Evan Jones;" secondly, by the defendant, Virginia Lee Benton, under and by virtue of the provisions of the last will and testament of one Joseph Crisp, deceased; thirdly, by the administrators *d. b. n. c. t. a.* of Joseph Crisp, deceased, as the property of his estate, and, lastly, by the administrators of Frederica Crisp, as the property of the deceased intestate.

The case was heard upon bill, answers and proof, and the decree of the Court, passed on the 31st day of March, 1908, directed the fund to be paid to the administrators of the estate of Frederica Crisp as part of her estate.

The defendant, Evan Jones, having departed this life on the 5th day of May, 1908, after the date of the decree, his administrator, Wm. D. Jones, was subsequently made a party plaintiff, and from the decree passed on the 31st of March, 1908, he has appealed.

It will be noticed that no appeal has been taken from this decree by either Mrs. Virginia Lee Benton or the administrators of Joseph Crisp, and for the purposes of this appeal the deposit will be treated as the property of Mrs. Crisp at the date of the deposit by her. The learned Judge who decided the case below stated in his opinion that as to the claim of Virginia Lee Benton, "I do not think the evidence establishes the fact that the fund in question is part of the estate

of Joseph Crisp, and so impressed with a trust, as to justify me in intercepting it before it passes into the estate of Frederica Crisp. I leave any claim Virginia Lee Benton may have against Frederica Crisp personally, or as administratrix of Joseph Crisp, to be asserted against the estate of Frederica Crisp."

Coming then to the real question presented on the appeal, and that is, did the entry in the bank book of the Savings Department of the Canton National Bank of Baltimore County, "Frederica Crisp in case of death subject to the order of Evan Jones," constitute a valid gift of the fund in controversy to Evan Jones under the laws of this State?

The record in the case is quite a voluminous one, but as a large portion of the testimony has no bearing upon the question we are called upon to decide it will not be necessary for us to consider it on this appeal.

The essential facts are set out in the pleadings and proof, and briefly stated appear to be these: Frederica Crisp, widow, late of Baltimore City, deceased, departed this life on the 20th day of February, 1905, intestate, and without children. On the 15th of August, 1904, she opened an account with the Canton National Bank of Baltimore County, and deposited therein the sum of \$2,500, the fund in question. The account was opened by the receiving teller of the bank, by her direction, and the following entry made on a book of deposit of the savings department of the bank: "Frederica Crisp, in case of death payable to Evan Jones."

This entry is in the handwriting of the teller of the bank, and the deposit book bearing the number of the account (No. 1502) was delivered to her. The teller (Mr. Bramble) testified that Mrs. Crisp was introduced to him by Mr. Evan Jones, who came to the bank with her, but was not present when the conversation took place between them at the time of the deposit. He further stated, "Well, she came in and asked to open this account, with \$2,500, and as is the custom in a case of that kind I asked how she wanted the book opened, and she said *I want this opened in my name and in*

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event of death to be payable to Mr. Jones. I opened it in that manner and the transaction was closed as far as we were concerned. I carried out her instructions to the letter."

There was testimony to the effect that Mrs. Crisp retained possession of the book of deposit until some time in October, 1904, about four months before she died, when she gave it to the plaintiff's intestate, and that the book was in his possession at the time of her death. There was also testimony as to certain declarations of Mrs. Crisp, made to members of the plaintiff's family, subsequent to the deposit, and in the presence of the plaintiff, to the effect: "All your father would have to do is to take the book down to the bank and have it transferred." "I am satisfied your father has as much money in the bank as I have."

Mrs. Jones, the wife of the plaintiff, testified that Mrs. Crisp brought the book to her house, asked her to get a piece of muslin, make a bag and sew the book in it. After complying with her request, she gave the book to her husband and he put it away, in the bureau drawer. The witness, Nellie Jones, testified, that after Mrs. Crisp came back from the bank she handed her the book and stated, "I want you to see how I have fixed the bank book." "I have put it in both names."

It also appears that one of the rules and regulations of the savings bank was, "Every person depositing shall be furnished with a book, in which the deposits and payments shall be entered; this book must be brought to the bank whenever a deposit is made or money withdrawn, that the transaction may be regularly entered thereon;" and that the bank would not pay out money deposited in the savings department without the production of the book.

Now, on this state of facts, the appellant contends that it was the clear intention of Mrs. Crisp to give the money in question to the appellant's intestate, and the delivery of the bank book to him, under the circumstances of the case, constituted a perfect and complete gift *inter vivos*.

The law controlling a gift *inter vivos* of deposits in savings

banks is well settled in this State, and it is clearly stated in *Taylor v. Henry*, 48 Md. 550, to be this: To make such gift perfect and complete, there must be an actual transfer of all right and dominion over the thing given by the donor, and an acceptance by the donee, or some competent person for him; and it is essential, to the validity of such gift that it should go into effect; that is, transfer the property at once and completely; for if it has reference to a future time when it is to operate as a transfer, it is but a promise without consideration, and cannot be enforced, either at law or in equity. Until the gift is thus made perfect, a *locus pœnitentiæ* remains, and the owner may make any other disposition of the property that he may think proper.

In the present case, the entry in the book of deposit was, Frederica Crisp, in case of death subject to the order of Evan Jones.

It appears, then, by the terms of the entry itself in the book of deposit that the fund here in question was to remain the property of the alleged donor during her life, and only in case of her death was it subject to the order of the donee. By this entry she not only retained the absolute control and dominion over it, but could have drawn it out of the bank during her lifetime and disposed of it at her pleasure. The transfer of the fund was not to take place "at once or completely," but it had reference to a future time when it was to operate; that is, in case of death of the donor.

In *Dougherty v. Moore*, 71 Md. 250, it is said: There is no case which decides that the donor may resume the possession and the donation continue, nor will the mere fact of possession in itself be sufficient; but it must appear that such possession was acquired with the consent of the owner, and with the intent on his part to relinquish all right and interest in the subject of the gift and making it the property of the donee.

Nor did the delivery of the book of deposit by the alleged donor, and the possession of it by the donee at the time of the death of the donor, under the facts and circumstances of this case, operate to make a valid and complete gift *inter vivos*

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of the fund in question. *Murray v. Cannon*, 41 Md. 477; *Whalen v. Milholland*, 89 Md. 207.

The delivery of the book of deposit in this case, with the entry thereon, "in case of death subject to the order of the donee," did not constitute a delivery of the money, because the delivery of the fund was limited "in case of death" of the donor. The possession of the book was entirely consistent with the form of the entry in the book, because the donee could not withdraw the money.

It is very clear, we think, that she did not intend to part with the possession and dominion over the property, and under all the decisions this is necessary to constitute a valid and perfect gift *inter vivos*.

While the donor here did not intend to relinquish her right to the fund in her lifetime, she did mean that in case of her death the donee should draw the funds then in bank. The entry, however, cannot operate as a testamentary disposition of the fund, because it is not executed as the law requires. *Taylor v. Henry*, 48 Md. 557; *Dougherty v. Moore*, 71 Md. 252.

Being of opinion, under the facts of this case, that there was no valid gift *inter vivos* of the fund here in controversy, the decree of the Court below will be affirmed.

Decree affirmed, the costs to be paid out of the fund by the administrators.

HENRY H. DOWNING, RECEIVER vs. THOMAS H. ROBINSON ET AL.

Principal and Surety—Subrogation—Acceptance of Third Party's Obligation in Satisfaction of Debt.

Seven persons agreed among themselves to buy certain parcels of land from an Improvement Company, and, in accordance with their agreement, the property was conveyed to one of

them, A., individually, who executed to the Improvement Company, his personal bonds for the deferred payments. He also signed a declaration of trust setting forth the real interest of the parties in the property. Each one of the purchasers paid his one-seventh of the first two instalments of the purchase money to A., who paid it over to the company. No other payments were made and upon the insolvency of the company, its receiver filed the bill in this case to enforce payment of the balance of the purchase money from said persons, other than A., alleging that defendants were each bound to pay one-seventh thereof to A. and that the plaintiff, as a creditor of A., is entitled to be subrogated to his claim against the defendants. *Held*, that A. was not a surety for the defendants, who were not directly indebted to the company, and A. had not paid any money for them, and that the Receiver is not entitled to maintain the bill.

Held, further, that if the liability of the defendants to the company was not extinguished by its acceptance of A.'s individual bonds for their debt, it is barred by the Statute of Limitations.

Decided November 12th, 1908.

Appeal from the Circuit Court for Harford County (DUNCAN, J.)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

E. P. Keech, Jr., and Osborne I. Yellott, for the appellant.

Wm. H. Harlan and Thomas H. Robinson, for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

The bill in this case asserts and seeks to enforce the right of the appellant to the benefit of an alleged claim of the ap-

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pellee, Charles A. Macatee, against his co-appellees for a portion of the purchase money for certain building lots. The material circumstances which are asserted to have conferred on the appellant the right of subrogation or substitution to the claim of Macatee appear from the record to have been as follows:

In the year 1890 a Virginia corporation known as the Front Royal and Riverton Improvement Company, of which Henry A. Downing was president and Charles A. Macatee was a director, attempted to develop as an addition to the town of Front Royal a tract of farming land lying in its vicinity. For that purpose the means then currently employed in exploiting town sites in the Valley of Virginia were adopted. Engagements were secured from various educational, manufacturing and industrial enterprises to establish themselves on the property. The land was platted and laid out in streets and blocks and a prospectus was prepared and issued setting forth in glowing terms the present advantages and future prospects of the situation, and then building lots were offered for sale.

The appellees, other than Charles A. Macatee, were residents of Maryland, and had no interest in the improvement company; but, their attention having been called to its enterprise, they visited Front Royal and inspected the property to see whether it presented any opportunities for profitable investment.

The fever of speculation then prevalent in that neighborhood proved sufficiently contagious to induce them to agree on October 20th, 1890, to purchase from the company eleven of its building lots, embracing in all about one acre of land, at prices aggregating \$8,100, to be paid one-third cash and the balance one-half in one year and the other in two years after date. A short time thereafter it was agreed between the purchasers of the lots and Charles A. Macatee that he should assume one-seventh interest in the purchase and that as a matter of convenience, the title to the property should be taken and held in his name. The first instalment of pur-

chase money was paid by the seven appellees in equal shares and the eleven lots were conveyed by the company to Macatee, who gave to it his twenty-two individual bonds for the two deferred instalments. He then as evidence of the nature of his holding of the title as between him and his co-appellees executed and delivered to them the following declaration of trust:

"This declaration of trust made this..... day of November, in the year eighteen hundred and ninety by C. A. Macatee of Front Royal, Virginia.

"Whereas, the said C. A. Macatee has received from the Front Royal & Riverton Improvement Company of Front Royal, Va., deeds for the following lots in or near Front Royal, Va., viz:—lots No. 23 & 24 in block 23, Sixth St. Lot 14 in block 18, Sixth St.; Lots 1 and 2 in block 17, Va. Avenue; Lots 1 and 2, block 15, Va. Avenue; Lots 9 & 10, block 21, Commerce Avenue, and Lots 1 and 2, block 33, Warren Avenue, as located on a plot of the property owned by said Front Royal & Riverton Improvement Company, and whereas the said C. A. Macatee has only a one-seventh interest in said lots, the other six-sevenths interest therein being owned equally by J. H. C. Watts, Martin L. Jarrett, Edwin H. Webster of Jno., William S. Forwood, Jr., Thomas H. Robinson and Frank B. Macatee, all of Harford County, in the State of Maryland, and whereas said parties have paid to the said Front Royal and Riverton Improvement Company one-third of the purchase money, each party paying one-seventh thereof (being \$350.58) at the execution of said deeds to C. A. Macatee; and whereas said lots were purchased as aforesaid for the purpose of conveying them to such purchaser or purchasers at such time and for such price as the parties interested therein may direct, and to save inconvenience and delay in the execution of a conveyance it was agreed that the legal title to said lots should be put in the name of the said C. A. Macatee.

"Now, therefore, the said C. A. Macatee does hereby declare that he has only a one-seventh interest in the aforesaid

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lots purchased from the Front Royal & Riverton Improvement Company and particularly described in the deed from said company to the said Macatee, the other six-sevenths interest therein being owned equally by the said J. H. C. Watts, Martin L. Jarrett, Edwin H. Webster of Jno., William S. Forwood, Jr., Thomas H. Robinson and Frank B. Macatee, of Harford County, Maryland.

"Witness my hand and seal the day and year above mentioned.

"C. A. MACATEE. (Seal)."

The second instalment of purchase money for the lots was paid at or near its maturity by Charles A. Macatee, to whom the other appellees each sent a check for his share of the instalment, although the improvement company and its development scheme had already sunk into a languishing condition. When the third instalment fell due Charles A. Macatee paid his own one-seventh of it, but the other appellees, with the exception of J. H. C. Watts, never paid their shares of it. By that time the speculative boom in the valley had collapsed and the improvement company and its projects had come to naught. Charles A. Macatee was financially ruined by the failure of the company, and he still remains in an insolvent condition.

On the 28th of February, 1898, Henry H. Downing was appointed receiver of the improvement company by the Circuit Court of Warren County, Virginia, and directed to collect the assets of the corporation and to institute and maintain such suits as might be necessary for that purpose. On October 21st, 1904, but three days less than twelve years after the maturity of the last instalment of the purchase money for the lots purchased from the company by the appellees, Downing, as receiver, having first obtained leave of the Court for that purpose, filed the present bill against them for the recovery of that instalment with interest.

The theory of the bill is that, as the result of the relation existing between the appellees in reference to the purchase of the lots referred to, Charles A. Macatee stands in the atti-

tude of surety for his co-appellees, and in that situation is entitled to claim reimbursement from them to the extent of their respective portions of the unpaid balance of purchase money and interest, and that the appellant, as the creditor of Macatee, is entitled to the benefit of his claim against them. All of the appellees as defendants below answered the bill. Charles A. Macatee filed a separate answer, practically admitting all of the allegations of the bill and consenting to the granting of the relief prayed for. The other appellees, as defendants, filed a joint answer, admitting the purchase of the lots and their conveyance to Charles A. Macatee and the execution by him of the declaration of trust in their favor and the payment by them of two instalments of the purchase money and the non-payment of the third one by any of them, except J. H. C. Watts, but denying the existence of any indebtedness or obligation on their part to Macatee or to the appellant or the corporation of which he claimed to be the receiver. Their answer further set up by way of defense that they had been induced to purchase the lots by the fraudulent representations of Downing and Macatee, as president and director of the improvement company. They also set up and relied upon the Statute of Limitations, in their answer, as a defense to the bill. The case was heard in due course in the Court below and the bill was dismissed by the decree, from which this appeal was taken.

The appellant contends that in the state of facts to which we have adverted Charles A. Macatee should be in equity regarded as standing in the situation of surety for his co-appellees for the payment of the purchase money for the eleven lots, and he invokes in behalf of the improvement company, under whose title he claims, the well-recognized equitable proposition, that when a principal debtor has given any security or other pledge to his surety the creditor is entitled to the benefit of such security or pledge in the hands of the surety, to be applied in payment of the debt.

He also relies upon the other equitable doctrine, which has repeatedly been recognized by this Court, that a surety, after

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the debt has become due, may maintain a bill to require the principal debtor to pay it, whether the surety has been sued for it or not. Both of these two equitable doctrines are supported on the appellant's brief, by the citation of numerous decisions of this and other Courts, and if either of them were applicable to the facts disclosed by the record it may be conceded that it would be conclusive of his right to recover.

It is, however, fundamental to both of the propositions so relied on by the appellant that Charles A. Macatee be determined to have been *surety* for his co-appellees for the payment of the purchase money for the eleven lots, but we are unable to find in the record sufficient ground for holding him to have occupied that relation to them. He was not formally their surety, for the bonds which he gave to the company for the deferred payments were not their obligations on which he appeared as surety. They were his individual obligations for a debt for which both he and his co-appellees had been originally liable.

The arrangement, in reference to the purchase and proposed sale of the lots, into which the appellees entered, as evidenced by the declaration of trust executed by Macatee, created a tenancy in common or at most co-partnership as between them, but it did not involve a suretyship. A somewhat similar arrangement as to the purchase and sale of lands for account of several persons was held by us in *Mogart v. Smouse*, 103 Md. 463, to have constituted its participants co-partners. The present case fails to fall within the operation of the first mentioned of the two equitable doctrines under discussion for the further reason that the record does not show that the appellees, other than Macatee, ever placed in his hands any security or pledge which can be applied to the payment of the debt now sought to be recovered.

Nor is the appellant entitled to the benefit of the other proposition relied on in his brief and supported by the authorities therein cited, that when a surety or even an agent has paid a debt of the principal debtor he is entitled to recover from the latter the amount so paid for him, because

Macatee, to whose right the appellant seeks to be subrogated, is not shown to have paid any debt for which his co-appellees were liable, otherwise than with funds furnished to him by them for that purpose.

The original liability of the appellees to pay for the lots purchased were, so far as the record shows, a simple contract obligation. If that obligation was not extinguished under the rulings of this Court in *Davidson v. Kelly*, 1st Md. 492, by the giving and receipt of Macatee's individual bond for the debt, it has long been barred by the Statute of Limitations, which was set up by the answer of the appellees as a defense to the present suit.

During the progress of the case below the appellees as defendants took a number of exceptions to the admission of testimony, but they were not passed upon by Circuit Court for the reason doubtless that the appellant as plaintiff had not made out a case for relief in equity. Having come to the same conclusion as to the insufficiency of his case, we deem it unnecessary to notice those exceptions. We think it due to the appellant and to the appellee, Charles A. Macatee, to say that, in our judgment, the record does not sustain the charges made against them in the answer of the other appellees of fraudulent conduct in procuring or making the sale of the lots on behalf of the improvement company.

For the reasons stated in this opinion the decree appealed from will be affirmed.

Decree affirmed with costs.

CHARLES W. LORD vs. HARRY W. SMITH.

*Question of Fact as to Ownership of a Business—Injunction—
Conduct by Plaintiff Held Not to Have Been in Fraud
of Creditors and Not to Disentitle Him
to Relief in Equity.*

The plaintiff's bill in this case alleged that defendant had been employed for a number of years as a salaried clerk in a busi-

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ness established by plaintiff, but that the defendant had recently claimed to be the owner. The defendant alleged that he was the sole proprietor of the business, and that the plaintiff had served as his clerk. The bill prayed for an injunction restraining the defendant from interference with the business or property of the concern, and from soliciting its patrons. The evidence examined and *held* to establish the allegations of the bill and to entitle the plaintiff to the relief prayed.

Upon the failure and insolvency of a firm of which the plaintiff was a member, he surrendered to its creditors all his interest in the firm, and all of his individual property. Before these creditors were paid, plaintiff began a new business as the sales agent of manufacturers, in which he employed one S. as his clerk, and in order to prevent the proceeds of the sales to be made by him as agent from being attached by his former creditors, he placed his bank account and insurance in the name of S. Afterwards, when S. claimed to be the owner of this business, plaintiff filed a bill for injunction and other relief against such claim. *Held*, that the purpose of the plaintiff in thus placing his bank account in the name of S. was not to defraud his creditors, who were afterwards fully satisfied, and that consequently he is not disentitled to the relief sought, by reason of the maxim that he who comes into equity must come with clean hands.

Decided December 9th, 1908.

Appeal from the Circuit Court of Baltimore City (PHELPS, J.)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

Wm. S. Bansemer (with whom was J. Kemp Bartlett on the brief), for the appellant.

William A. Wheatley, for the appellee, submitted the cause on his brief.

WORTHINGTON, J., delivered the opinion of the Court.

The litigation in this case grows out of a dispute between the parties as to which is the proprietor of a certain brokerage business carried on in Baltimore City for a number of years past under the trade name and style of Charles W. Lord & Co.

The appellant, who was the complainant below, claims that the business was established by him in 1895, and has ever since been conducted by him as the sole proprietor, with the appellee (the defendant below) as his trusted and confidential clerk. While, on the other hand, the appellee contends that the business was established in 1895 by him, and that it has ever since been conducted by him as sole proprietor, with the appellant as his clerk.

According to the testimony of the parties themselves, neither of them was aware of the claims and pretensions of the other until the month of November, 1907, when a controversy took place between them concerning the ownership of the business, and Mr. Lord, according to his testimony, claimed the whole; but according to Mr. Smith's testimony, Mr. Lord said in the course of that controversy that he had as much interest in the business as Smith had; that half of it was his. At the same time Smith claimed that the whole business belonged to him.

Shortly after this conversation, that is to say, on December 24th, 1907, Mr. Lord filed the bill of complaint in this case in the Circuit Court for Baltimore City, setting forth his claims to the business as sole proprietor, alleging that he had established the business in the early part of the year 1895, at 21 Grant St., in Baltimore City, and had there begun operations as a manufacturer's agent of wooden ware and kindred merchandise. That Harry W. Smith, the defendant, had been taken into the employ of the old firm of Lord and Robinson when he was a boy fifteen years of age, and had continued in its employ for many years until the failure of that firm in 1893. That complainant had been a member of the firm of Lord and Robinson until it went into the hands

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of receivers in the year 1893, and that there had developed toward Smith on complainant's part an attitude of trust and confidence. That upon commencing business again, after his failure, the complainant took with him to 21 Grant Street the said Harry W. Smith, in whose integrity he had implicit confidence, at the weekly salary of fifteen dollars per week, which was subsequently increased to twenty-five dollars per week.

That at the time he started the new business, the complainant was not entirely free from the obligations of the old firm, and as he contemplated handling in a fiduciary capacity, to wit, that of factor or sales agent, the money of such of his old business associates as might entrust the sales of their merchandise to him, he feared that if he opened a bank account in his own name, and deposited therein such monies, together with his own earnings, that such funds might be subject to the danger of being tied up by proceedings instituted by some of his old creditors, who had not at that time been settled with; and for the sole purpose of avoiding this danger he opened a bank account in the name of Harry W. Smith, with his consent, and took a power of attorney from the said Smith, authorizing the complainant to draw checks against said account.

That both he and Smith thereafter drew checks upon this account, so opened in the name of Smith, and that such practice was continued down to the time of filing the bill of complaint. That by reason of the confidential relations between the complainant and Smith, the latter was allowed broad powers in the handling of the complainant's cash and bank deposits, and that Smith, acting under these broad powers, would from time to time draw checks for his own purposes, over and above his weekly salary of \$25, and charge them on the books of the complainant, and would from time to time purport to put back sums of money to replace the amounts so withdrawn, which sums put back, however, did not in fact measure up to the amounts withdrawn.

That in the course of time the excess of the withdrawals

by Smith over the amounts put back by him was over \$9,000, not including withdrawals from the cash drawer.

That in October, 1907, Smith had purchased with \$1,750 of the complainant's money a ground rent on the dwelling property known as No. 2318 Guilford Avenue, in Baltimore City.

The bill further averred that Smith had recently set up pretensions that he was the sole owner and proprietor of the business, and that all the money taken by him was his own money, for which he was accountable to no one.

That Smith had threatened, unless complainant would recognize Smith's pretensions, to solicit away from the complainant his patrons and customers, which it was averred Smith was able to do.

The prayers of the bill were for an injunction:

(1) Prohibiting said Harry W. Smith from exercising any control or interference in the complainant's business, as it was known under his trade name of Charles W. Lord and Company.

(2) That said Smith be enjoined from collecting any monies or from diverting any consignments coming or due to the said Charles W. Lord and Company.

(3) That he be further enjoined from making any withdrawals from the bank deposit of the complainant, standing in the name of Harry W. Smith in the National Bank of Commerce of Baltimore.

(4) That he be further enjoined from removing any of the books of account, or other evidence of the state of business of Charles W. Lord & Co., from the office thereof, and that he return and replace in said office any books or other evidences of account of said business that were then under his individual control.

(5) That he be further enjoined from soliciting the patrons of the complainant, trading under the name of Charles W. Lord & Co., to discontinue business with the complainant and to give their patronage to the said Smith.

(6) That pending these proceedings, the defendant be

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further enjoined from disposing of the lot of ground No. 2318 Guilford Avenue, mentioned in the bill of complaint.

Also that said Harry W. Smith discover and set forth in detail all the sums of money taken by him during the whole period of his employment since 1895, in excess of \$25 a week for services, and that Smith be decreed to make restitution and payment of all sums of money shown to be due by him to the complainant, and for general relief.

The same day an injunction prohibitory and mandatory was issued as prayed in the bill of complaint, except as to the prohibition against the disposition of the lot on Guilford Avenue.

On February 17th, 1908, the defendant filed his answer, denying all the material allegations of the bill of complaint and averring that he himself "was, has all the time been, and still is the sole owner of said business," and that no money had ever been contributed toward or used in said business except the defendant's own money, or money borrowed by him for that purpose. That the complainant had never made any pretensions to be any other than an employee of the defendant until shortly before filing the bill of complaint, and then he claimed to be only part owner of the business.

He asked that the injunction theretofore granted be dissolved and the bill dismissed.

After much time and patience spent in comparing the evidence of the several witnesses, we have finally been able to thread our way through the great mass of most conflicting testimony, taken to support the contentions and claims of the respective parties.

It would extend this opinion to an unreasonable length to attempt to set out here a synopsis of the evidence, consisting as it does of over 600 printed pages; but after the most careful consideration that we have been able to give it, we are unable to reconcile the claims of Smith with certain material facts established by the exhibits and documentary evidence produced at the hearing. One of these facts is that at the very commencement of the business, in 1895, certain

office furniture of the old firm of Lord and Robinson was purchased of the receivers of the firm for the use of the new concern at 21 Grant Street. Lord testified that he gave the money (\$25) to Smith with which to buy the property for him. Smith, on the other hand, testified that he bought the furniture with his own money for his own use. A receipt was, however, finally produced by Lord which on its face shows that the money had actually been paid by Smith, but on the back of the receipt and of the same date was the following indorsement, signed by Smith:—

“For value received I hereby transfer the articles mentioned.
to Charles W. Lord.

(signed) H. W. SMITH.”

Smith's explanation of why he made this transfer, in view of the fact that he claimed to have himself established the business, is, in our judgment, far short of being satisfactory.

Another important fact not disputed is that the assessment of the property of the concern on the tax books of Baltimore City was in the name of Charles W. Lord & Co., Smith's name not being mentioned in connection therewith. Besides this, Mr. Lord produced at the hearing below books of entry concerning the business from its very beginning in 1895 to the time the controversy between him and the defendant arose in 1907, in which books were entered the items of cash received and cash paid out during the whole period, as it seems, these entries in many respects substantiating Lord's claim to be the founder and sole proprietor of the business. The production of these books, or at least of some of them, was evidently a great surprise to Smith, who testified that he understood from Mr. Lord that they had been burned in the great fire of February, 1904. These books show the payment, weekly, to Harry W. Smith, on every Saturday, at first of the sum of \$15 and later of the sum of \$25, charged either to “hands” or “expenses,” and the entries continue regularly

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from week to week down to October 10th, 1903, and most of these entries, as it appears, were made in the handwriting of Smith himself. The withdrawals of money by Mr. Lord, however, were not charged to either "hands" or "expenses," or any other distinct account, and, besides, they vary in amount from time to time, thus clearly indicating that Smith worked on a salary, and that Lord did not. Another significant fact is that the contracts for the rental of the rooms at different times occupied for the purposes of the business and the rent bills for the use of the same were invariably made in the name of Charles W. Lord & Co.

Another quite significant fact, and one that cannot be disputed, is that the license to carry on the business was, from 1895 to 1907, always issued to Charles W. Lord alone, and this was true although the applicant who made the representations to the license clerk, apparently under oath, was several times H. W. Smith himself.

In the year 1907, however, upon the application of Smith the license was issued for the first time to Charles W. Lord and Harry W. Smith, trading as Charles W. Lord & Co.

Much other testimony of a character tending to prove Mr. Lord to be the founder and proprietor of the business was adduced, but need not be referred to here in detail.

Mr. Smith, on the other hand, relied upon the fact that the bank account was in his name and checked upon by him at all times as he saw fit. That besides his regular weekly salary, charged to him as such, he drew various sums from time to time in the aggregate largely in excess of his salary, some of which afterwards he returned and some he did not, claiming that as the business was his he was not accountable to anyone for such withdrawals. He further relied upon the fact that the insurance on the stock carried by the concern was in his name, and that after the great Baltimore fire, in February, 1904, the amount of this insurance was paid to him.

Certain manufacturers dealing with the concern also testified that they had always dealt with Smith as the proprietor,

and that they had no dealings with Lord whatever, and they regarded Smith as the owner of the business. Certain members of the office force also testified in effect that they regarded Mr. Smith as the proprietor. As we have before indicated, however, the controlling facts of the case upon the question as to who started the business in 1895, at 21 Grant Street, and continued it down to the time of filing the bill of complaint in this case, are, in our opinion, those first above recited in support of Mr. Lord's contention.

We must therefore hold that Charles W. Lord was the founder and proprietor of the business, and that Harry W. Smith, the defendant, was his salesman and confidential clerk.

The learned Judge in the Court below did not find to the contrary of this, but dismissed the complainant's bill upon the ground that Mr. Lord, at the time he commenced business in 1895 had not paid off his former creditors, and that consequently the placing of the bank account and the insurance in the name of Harry W. Smith was done for the purpose of defrauding, hindering and delaying these creditors.

He then applied the maxim, that he who comes into equity must come with clean hands, and held that under the circumstances a Court of equity should grant no relief, but leave the parties where it found them; citing *Roman v. Mali*, 42 Md. 574, and some other cases in support of his position. While we recognize and approve the doctrine of those cases, yet we cannot agree that this is a case to which the maxim above quoted is applicable.

As the complainant was about to embark in a business requiring him to handle goods on commission, and, in consequence, to have in his custody and possession from time to time the monies of other people, he may very well have desired to save those persons the possible embarrassment and expense of having their money, if deposited in his name, tied up by way of proceedings in attachment.

Mr. Lord had previously to embarking in the new business surrendered and given up not only all his interest in the assets of the firm of Lord and Robinson, but also all his own

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individual property and assets for the benefit of his creditors, and it appears that these assets have yielded or will yield sufficient to satisfy all his obligations and leave a surplus besides.

It is true that this result may not have been known in 1895, when the account in bank was first opened in Smith's name, but Lord had then already stripped himself of all he owned in order to satisfy his obligations in full, and was starting business anew, with other people's merchandise and upon other people's credit.

While we have no purpose to relax the strict enforcement of the maxim, that "He who comes into equity must come with clean hands," or, as it is sometimes expressed, "He that hath committed iniquity shall not have equity," yet in this case we are unable to satisfy ourselves that Mr. Lord has been guilty of any such iniquity or moral turpitude as should deny him the aid of a Court of equity.

After a somewhat extended research, we have been unable to find in this State or elsewhere a reported case in which the maxim has been applied under circumstances like these, and as the refusal of the Court to act always gives the defendant an unfair advantage of the plaintiff, contrary to the real justice of the case, the application of the maxim as a defence is only allowed for reasons of public policy, as a preventive check upon fraud and wrongdoing.

After a careful consideration of a number of adjudged cases, as well as of the purpose in view in the application of the maxim, we are unable to attribute to Mr. Lord any such fraud or wrongdoing as we think demands or justifies the application of the maxim in this case.

We hold, therefore, that he is entitled to relief.

It must be remembered that an agent owes to his principal the utmost fidelity, and that he is not allowed to make any profit for himself from the business in which he is employed to the detriment of his principal.

We think the plaintiff entitled to the benefit of the injunc-

tion as originally granted and to the accounting as prayed in the bill of complaint.

It is not for this Court to state an account between the parties, even if it were possible to do so from the record; that is more properly the business of a book-keeper or accountant; all we can do is to point out the principles on which it should be stated.

For the reasons assigned we think the decree of the lower Court should be reversed and the cause remanded to the end that there may be further proceedings in accordance with the views herein expressed.

Decree reversed with costs and cause remanded.

THE UNITED RAILWAYS AND ELECTRIC COMPANY *vs.* ROSE CORBIN.

Appeal—Motion in Trial Court to Strike Out Judgment After Appeal Taken.

After a judgment rendered in a Court of Baltimore City has become enrolled by lapse of thirty days, under Local Code, Art. 4, Sec. 317, and an appeal therefrom entered, bond to stay execution filed, and the record transmitted to the Court of Appeals, the trial Court has no jurisdiction to entertain a motion to strike out the judgment on the ground of surprise and fraud.

The affirmance of a judgment by the Court of Appeals precludes the lower Court from vacating it, unless the cause be remanded for further proceedings.

Decided November 12th, 1908.

Appeal from the Court of Common Pleas (HARLAN, C. J.)

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The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE and WORTHINGTON, JJ.

Joseph C. France and *J. Pembroke Thom* (with whom was *Albert R. Stuart* on the brief), for the appellant.

S. S. Field (with whom was *Philip M. Golden* on the brief), for the appellee.

BOYD, C. J., delivered the opinion of the Court.

The appellee recovered a verdict against the appellant in the Court of Common Pleas of Baltimore City for damages claimed to have been sustained by her by reason of the alleged negligence of the appellant. A motion for a new trial was made, which was overruled on April 6th, 1908, and the same day a judgment was entered on the verdict. On that date an appeal was taken to this Court, an appeal bond was filed and the necessary affidavits made to stay execution. On July 7th, 1908, the transcript of the record was transmitted to this Court by registered mail and received by the Clerk the next day.

On September 14 the defendant (appellant) filed a motion in the lower Court to strike out the judgment, alleging surprise, deceit and fraud, and making some specific allegations which need not be more particularly referred to. The Court set the motion for hearing, whereupon the plaintiff (appellee) filed a petition alleging, amongst other things, that the Court had no jurisdiction to entertain the motion to strike out the judgment pending the appeal in this Court, and prayed that the order setting the case for hearing be rescinded and that the hearing be postponed until such time after the decision by this Court as might be reasonable. The Court, after hearing the attorneys, granted the petition of the plaintiff, rescinded its order setting the motion for hearing and ordered that it be "postponed until such time as may be set by this Court after the decision by the Court of Appeals of the pend-

ing appeal in this case." The order recited that the Court was of opinion that it had no jurisdiction to hear and decide the motion to strike out the judgment while the appeal was pending in this Court. From that order this appeal was taken.

A motion to dismiss the appeal has been made on the ground that it is not a final order, but we will first determine whether the Court had jurisdiction to entertain the motion to strike out the judgment. Under Sections 317 and 318 of Article 4 of the Code of Public Local Laws, judgments are to be treated as enrolled thirty days after they are entered in the Courts of Baltimore City, as they were under the previous practice after the term at which they were entered, and any action taken or order passed in relation to any judgment entered by one of them after thirty days "(unless upon a motion or application made within that time) shall have the same effect and force as it would have had under such previous practice, if taken or passed after the expiration of said term, and no more." As this judgment was entered April 6th, and the motion to strike it out was not filed until September 14th, the statute is applicable. We are therefore to determine whether the lower Court has the power to strike out a judgment on a motion made after it is enrolled, after an appeal has been taken, a bond given and the necessary affidavit made to stay execution, and the transcript of the record has been transmitted to and received in this Court—the motion being founded on allegations of surprise, deceit and fraud.

Whatever may be the power of the lower Court over its judgment before an appeal is perfected, it seems clear to us that there was no reversible error in the action of the Court of Common Pleas, under the circumstances stated above. Section 15 of Article 4 of the Constitution, in referring to this Court, provides that "all cases shall stand for hearing at the first term after the transmission of the record," and Section 39 of Article 5 of the Code (1904) provides, that "upon the receipt of such transcript, the Clerk of the Court

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of Appeals shall enter the case upon his docket as of the term next after the receipt of such transcript." The appeal from the judgment was therefore regularly placed upon the docket of the present (October) term of this Court.

If a motion to strike out the judgment, which was filed on September 14th, three weeks before this term began, could be entertained by the lower Court, one filed after the beginning of the term could with equal propriety be heard, if the necessary allegations be made to account for the delay, etc. Such practice might result either in the time of this Court being occupied in hearing and considering an appeal from a judgment which the lower Court was at the same time considering the propriety of vacating, and might vacate, or it would require this Court to postpone the hearing and decision of the appeal until the lower Court determined whether it would vacate the judgment, although the question was not involved in the appeal in this Court. Circumstances might delay action by the lower Court for months, and in the meantime this Court could not with propriety dispose of the appeal, although regularly before it, because of the proceedings taken in the Court below, subsequent to the transcript being filed in this Court. If such be the right of a party losing a case, resort might be had to such a motion for the purpose of delay, or to annoy and harass the other party, for if the motion must be entertained by the lower Court it cannot always be speedily disposed of. We do not mean to intimate that such motives influenced the appellant in this case, as the standing of the attorneys representing it is such as to forbid such a suggestion, but we only speak of what might be possible, if that practice be sanctioned.

But in addition to those reasons, which may be said to only affect the convenience of the Court or the parties, or at most only to cause delay, which is not as of much importance as giving relief against fraud, the practice might result in conflicting actions of the two Courts which would not only be injurious to the parties interested, but would reflect discredit upon the administration of justice. This Court might, for

example, affirm a judgment the same day that the Court below struck it out. The Constitution says that the judgments of this Court "shall be final and conclusive," and there are statutes in force which would cause great confusion, to say the least, if the two Courts were permitted to act in reference to the same judgment at the same time. Under Sec. 22 of Art. 5 this Court has power, whether a judgment be reversed or affirmed, to grant a new trial, if it be of the opinion it ought to be granted, and it might affirm a judgment and order a new trial, and the lower Court might the same day pass an order refusing to strike out the judgment.

Under Sec. 23 of that Article, if this Court reverses a judgment, it can, on the statute being complied with, direct the Clerk to transmit a copy of the record to the Clerk of the Court of some other County or City, with an order directing it to proceed with a new trial, while the lower Court might strike out the judgment and order the case to be retried. Or the judgment might be affirmed in this Court and execution issued thereon, while the lower Court might grant the motion to strike out the judgment on which the one in this Court was based. The bond could be sued if the judgment is affirmed by this Court, and other instances of confusion and injury might be given.

If it be said that it is not contended that the two Courts can act concurrently, which is to have precedence? Is this Court to wait until the lower Court acts? If so, where is the authority for it? There is no statute authorizing such delay, and it would be a very questionable exercise of power for this Court to continue a case pending here, at the instance of the appellant and against the will of the appellee, to await the action of the lower Court on a motion made after the appeal was regularly docketed in this Court. If, on the other hand, it be said that the lower Court must wait until this Court has acted, that is precisely what the order appealed from provided for. If the appellant desired such motion to be acted on by the lower Court, it had the undoubted right

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to dismiss its appeal and thereby enable that Court to act on the motion.

We do not find any authorities contrary to the views we have indicated which would be binding upon us, or which we would be justified in following, under our statutes and practice. In the case of *Rayner v. Jones*, 90 Cal. 81, cited by the appellant, the defendant filed a motion for a new trial after an appeal had been taken, but, as said in the opinion of the Court, "in due season." The Court held that the lower Court was in error in proceeding on the theory that, as the judgment had been appealed from when the motion for a new trial came on for hearing, it had lost jurisdiction to determine it, and the appeal from the order of the lower Court dismissing the motion was treated as an appeal from an order denying a new trial, which is appealable in California. In this State a final judgment cannot be entered until after the motion for a new trial is determined, if it is made within the time allowed for such motion, *Heiskell v. Rollins*, 81 Md. 397, and hence no such question can arise as there was in that case. In *People ex rel. Hoffman v. Board of Education*, 141 N. Y. 86, there was a motion in the Court of Appeals for an order directing the former attorneys of the relator to deliver certain papers to her attorney afterwards employed. The Court said that the application should be made to the lower Court. The case of *Gale v. Nickerson*, 144 Mass. 415, does not aid us in reaching a proper conclusion, as it and the case therein cited show that in that State the practice is altogether different from ours.

On the other hand, there are many authorities to the effect that, "Where an appeal has been perfected, the jurisdiction of the appellate Court over the subject-matter and the parties attaches, and the trial Court has no power to render any further decision affecting the rights of the parties in the cause until it is remanded," 2 *Ency. of Pl. & Pr.* 327, and cases cited in note. Or as said in 2 *Cyc.* 975, "So, after the appeal is taken, the judgment in the Court below cannot be vacated and set aside, subject, however, to the power of Courts over

their own judgments during the term, notwithstanding steps taken to perfect an appeal." Of course, we do not mean to say that there can be no subsequent proceedings under any circumstances. If, for example, there be no bond or affidavit, as provided for by statute, and an execution is issued on a judgment, the lower Court can entertain a motion to quash the execution, or to set aside the sale, notwithstanding an appeal from the judgment has been perfected, but such action would not conflict with what was before this Court. So in *Rohrbach v. Rohrbach*, 75 Md. 317, it was held that the Court could allow counsel fees to a wife after the appeal had been taken by the husband from a decree dismissing his bill for divorce. If that were not so a wife might not be able to be represented in this Court. See also *Chappell v. Chappell*, 86 Md. 532.. In *Rice v. West*, 42 Md. 614, it was held that a case could not be removed after judgment by default had been entered, and during the pendency of an appeal from an order passed after the judgment by default, refusing to move the case, the Court could extend the judgment and issue execution thereon, but there was no bond to stay the proceedings in that case. Other cases might be cited in which there were subsequent proceedings after an appeal had been taken, but there is no case in this State sanctioning action by the lower Court on the very subject-matter of the appeal, unless perhaps it be something done for the preservation or protection of the property involved, and then only when the rights of the parties cannot be affected by such action of the Court.

In *Avirett v. State*, 76 Md. 510, 538, judgment was entered on May 24th, 1892, and on the next day a motion was made to strike it out. While that motion was pending the traverser, on July 15, 1892, entered an appeal from the judgment. A motion to dismiss the appeal was made by the Attorney-General on the ground that, as testimony was taken and a hearing had on the motion to strike out the judgment, the appeal taken on July 15 was waived, because the appeal operated to remove the record from the Circuit Court, and

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further proceedings on the motion to strike out the judgment could only have been taken on the assumption that the record was still there, and hence if still there the appeal must have been abandoned. This Court refused to adopt that view, and in considering the question said: "The appeal of itself neither stays execution nor necessarily suspends all other proceedings in the Court below. Unless it does do this, the mere ordering of the appeal did not deprive the lower Court of the jurisdiction to hear the motion; and if the Court had jurisdiction to decide the motion after the appeal had been prayed, the hearing of the motion could not be regarded as a constructive or an actual waiver of the appeal." After holding that the appeal was not waived, Judge McSherry added: "But if it be granted that after the entry of an appeal the lower Court had no longer the jurisdiction to hear the motion, then, instead of the appeal being waived or abandoned by the hearing of the motion, the motion was prematurely and improvidently heard. In either view the motion to dismiss must be overruled." There was also a motion to dismiss the appeal taken from the refusal of the Court to strike out the judgment, but the Court said that as it did not find it necessary to consider that appeal, the motion to dismiss it need not be passed on. It therefore did not determine the question which was more analogous to the one now under consideration than the others in the case.

But that case wholly differs from this in several respects. In the first place, the motion to strike out was made the day after the judgment was entered and during the same term, and was determined before the transcript of the record was sent to this Court. The ruling on it was contained in the same record as the other appeal. It does not therefore in any way help the appellant, and we do not want to be understood as intimating that merely entering an appeal from a judgment would prevent a motion to strike it out from being heard. If the transcript of the record has not been transmitted to this Court, the appellant can dismiss his appeal in

the lower Court, or that Court may dismiss it if the transcript is not transmitted within the time required by law.

Whether the lower Court can vacate a judgment, or take other action, on a motion made before the transcript is transmitted, after it is transmitted, is not involved in this appeal.

It was not decided in *Maryland Steel Co. v. Marney*, 91 Md. 360, that the lower Court could not vacate a judgment after affirmance by this Court, if proper grounds were shown, but we did decline to concede that it could be done, under the circumstances of that case. That judgment had not only been affirmed, but it had been superseded in this Court. As a supersedeas of a judgment under our practice requires a confession of judgment by the defendant and his sureties, which in that case was recorded in this Court it is difficult to understand how the latter could be affected by a motion to strike out the original judgment in the lower Court. It is perfectly certain that complete relief could not be given by the lower Court vacating that judgment, and in speaking of the question raised, whether a party could make a motion to strike out a judgment in the Court where it was rendered, and at the same time file a bill in equity to have it set aside, we said: "Under the peculiar circumstances of this case, where there is a judgment in the Court below, which was affirmed in this Court and then superseded, a Court of equity could undoubtedly afford more ample relief, if the appellant is entitled to it, than could be obtained in the Court of Common Pleas, especially if it be necessary to enjoin the holders of the judgment from enforcing it, as this bill seeks to do."

But we are of the opinion that an affirmance of a judgment at law by this Court does preclude the Court below from vacating the original judgment appealed from, unless it be a case which can be remanded after affirmance, and has been actually remanded for some further proceedings, if there be such case. Sec. 70 of Art. 5 of the Code authorizes a writ of *feri facias* or attachment to be issued upon any judgment of this Court, directed to the Sheriff of the County in which the original judgment appealed from was rendered, and also to

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other counties upon good cause shown, and Sec. 71 makes provision for issuing such writs to Baltimore City. The statute requires a short copy of the judgment to be sent with the writ. It would be an anomalous condition of affairs if, after a judgment had been affirmed and an execution or an attachment had been issued from this Court, and there had been sent with it a copy of the judgment to the county or city from which the appeal was taken, the lower Court could vacate the judgment on which the one in this Court was based.

A judgment of this Court is a lien on all the lands of the defendant in this State, 2 *Poe*, 377, and it would seem to be clear that if the lower Court had the power to vacate its own judgment it could not disturb that of the appellate Court. It would therefore be a useless proceeding to permit it to be done, and in the absence of some statute we must hold that it cannot be done. This conclusion does not necessarily work an injustice upon a defendant, for we in effect held in *Marney's Case* that a Court of equity could give relief when the facts justified it, and there are other decisions of this Court to the same effect.

Of course, in what we said above, we were speaking of an ordinary judgment at law, such as that in this case, and when there is an affirmance without other action of this Court. Nor does what we have said apply to an equity case remanded to the lower Court with directions to it to enter a decree in conformity with the opinion of this Court, or for further proceedings. As was done in *Safe Deposit Company v. Gittings*, 102 Md. 456, a bill of review upon the ground of material evidence discovered since the passage of the decree may be filed upon leave granted by the lower Court.

The lower Court was justified in refusing to hear the motion to strike out the judgment while the appeal was pending in this Court, and the appellant cannot complain of its postponement of the hearing. If the appeal from the judgment should for any cause be dismissed, the appellant may get the benefit of the motion pending.

So without considering the motion to dismiss this appeal, we will affirm the order.

Order affirmed, the appellant to pay the costs.

EDITH BLANCHE STEINMAN vs. THE BALTIMORE
ANTISEPTIC STEAM LAUNDRY COMPANY.

*Assault and Battery—Insufficient Evidence—Master Not Liable
for Assault by Servant Not Acting Within Scope
of Employment—Ratification.*

The evidence is insufficient to support an action of assault and battery when it is merely to the effect that an employee of the defendant, a laundry company, called at the plaintiff's house and, in spite of plaintiff's protest, took certain blankets from a chair on which they were lying, and that, in so doing, his knee accidentally came in contact with plaintiff's knee.

When the rules of a laundry company provide that its drivers shall collect the money due for goods upon delivery of the same, and that if goods are delivered without payment, they shall be responsible therefor to the company, a driver who delivers goods without payment, and subsequently calls to collect the money due therefor, is not acting within the scope of his employment, and the company is not liable for an assault then committed by him.

When the driver commits an assault under such circumstances, the laundry company is not to be held to have ratified his act merely because it offered to return the goods then taken by him.

A principal does not ratify an assault committed by his agent, not within the scope of the agent's employment, except by some act done with knowledge of the material facts.

Decided December 4th, 1908.

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Appeal from the Baltimore City Court (SHARP, J.)

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE and WORTHINGTON, JJ.

Arthur L. Jackson, for the appellant.

W. Stuart Symington, Jr. (with whom was *Henry H. Dinneen* on the brief), for the appellee.

PEARCE, J., delivered the opinion of the Court.

This is an action of trespass *vi et armis* by the appellant against the appellee for an alleged assault and battery committed by an agent and servant of the defendant corporation in the regular course of his employment by the defendant. The defendant is a laundry company, duly incorporated.

The plaintiff, who is a married woman, to prove her case, produced only two witnesses. Her first witness was G. E. Saffran, who testified that he was route superintendent of defendant at the time of the alleged assault, and that he was required in the discharge of his duty to adjust disputes about the work done by the laundry company; the non-delivery, or misdelivery, of laundered goods, and complaints made to the laundry company, or claims presented against the company. On cross-examination he said he was authorized to compromise or settle claims under fifty cents, but for any claim over that amount he was obliged to obtain the authority of the manager of the company. He also said he was authorized to collect money due the company; that when the wagon drivers deliver work without getting the money, they do so at their own risk, and that in such case he is authorized to compromise the claim under fifty cents, but that he has no authority to arrest persons against whom the company has claims for work done. He also stated that when a driver is sick or discharged, he takes his wagon at the laundry, and that when he went to Mrs. Steinman's house on the day of the alleged assault, he went *of his own accord, to collect his own*

money. The plaintiff, Mrs. Steinman, was the only other witness. She testified that Saffran came to her house on the day of the alleged assault and said, "Let me see the blankets that were left here;" that she brought the blankets and said, "Are they the wrong blankets?" and he said, "No, they are the right blankets, and I am going to take them with me." That she said, "No, you are not," and he put his hands on the blankets," and she said, "No, you are not," and put her hands on them. That he then said, "There is a police across the street, and if you don't take your hands off the blankets, I will call him and have the policeman arrest you." She says she thought he had a policeman with him and she turned and looked, and when she turned he took the blankets and went out, and then came back and said, "Don't tell your husband I frightened you to death," "and then I knew nothing else." She was then asked if he touched her at all, and she replied, "With his knee against my knee;" that she was sitting on a chair and the blankets were on a seat beside her; that she was then about four months advanced in pregnancy; that when his knee touched hers it caused no pain. She then offered to prove by herself that after the facts above stated she fainted, and when she revived found she had suffered a uterine hemorrhage, and further offered to prove by a practicing physician of twenty years' standing that he was her physician and knew she was then about four months advanced in pregnancy, and that the uterine hemorrhage testified to by her was a natural result of the nervous shock and fright caused by the conduct of Saffran as described by her.

She also offered to prove that her husband, about three weeks after this occurrence, received a letter from Messrs. Yellott & Symington, attorneys for the laundry company, asking him to call at the laundry for "his two blankets," which he could have on payment of one dollar, the charge for washing them, or they would be sent him on payment of that amount. All this offer of testimony was objected to, and to its exclusion the first exception was taken.

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The defendant then offered two prayers withdrawing the case from the jury, both of which were granted. The first of these prayers asserted there was no legally sufficient evidence to entitle the plaintiff to recover, and the second, that there was no legally sufficient evidence that the alleged assault was committed by the witness, Saffran, within the scope of his employment by the defendant.

The declaration is unusually brief, merely alleging that "the defendant, by its agent and servant, in the regular course of employment, assaulted and beat the plaintiff in the City of Baltimore on May 25th, 1906. And the plaintiff claims \$5,000 damages." But the averments are ample to warrant recovery, if sustained by legally sufficient evidence. It was necessary to prove, first, that an assault was committed by defendant's servant, and, second, that it was committed in the course of his employment. It would not be sufficient to show that a wrong was committed in taking the blankets from the premises and possession of the plaintiff.

The exclusion of the testimony offered and the ruling upon the prayers involve but one question and may be considered together. If the proffered testimony was legally sufficient as tending to show an actual assault by Saffran, and that it was committed in the course of his employment, or that it was approved and ratified by the defendant, it should have been admitted. If it did not, it was properly excluded, and the same principles are applicable to the prayers offered.

The only evidence that Saffran touched the plaintiff's person at all was her evidence, that when he took the blankets from the chair upon which they were lying, and which was beside the chair in which she was seated, that his knee came in contact with her knee, causing her, as she says, no pain. There is no evidence whatever of any threat of violence or any attempt to use force, or of any gesture indicating such purpose. It would not be possible, if his knee had not touched hers, that an action for assault alone could be maintained, and to warrant a recovery the evidence must establish a battery. The weight of authority is decided, that the mere

touching of one's person by another, unless wilfully or in anger, or in a contemptuous or insolent manner, does not constitute a battery, but it is unnecessary to review these authorities. There is no pretense here that this contact of his knee with hers was wilful, angry or insolent, and the only inference from her testimony is that it was purely accidental, as in the case of one stumbling, and in his fall coming in contact with the person of another.

But the plaintiff, nevertheless, contends that as she claims to have had her hands resting on the blankets when Saffran took them from the chair, that he was guilty of technical assault, and to sustain this contention she relies upon the case of *Dyk v. DeYoung*, 35 Ill. App. 138. In that case the defendant attempted to snatch from the hands of a married woman, then pregnant, a receipt which she held. In the struggle the paper was torn, and she testified that the defendant, as he grasped for the receipt, struck her in the abdomen. The Court held that this was a technical assault. It is true that "anything attached to the person partakes of its inviolability," as stated in *Selwyn's Nisi Prius*, 27, and there is no occasion to criticise the Illinois case above, its facts bringing it within that rule. But the present case is quite different. Here it is clear that instead of using violence, the defendant resorted to a ruse to obtain the blankets. He told her, "I will call that police and have you arrested." She says, "I looked, and there was a policeman across the street, and when I looked he took the blankets and went out, and then he came back and said, 'Don't tell your husband I frightened you to death.' " The latter part of this statement is somewhat difficult to understand, but its truth or accuracy plays no part in the questions we are considering.

After a careful consideration of the facts of this case we cannot agree that it measures up to the Illinois case, nor to the cases cited therein, and we are of opinion that there was no error in excluding the evidence offered, nor in granting the defendant's first prayer. But if an assault were made out, we think it is clear from the evidence that Saffran was not

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acting within the scope of his employment, and that there was no ratification of his action by the defendant. He was called as a witness by the plaintiff, and his undisputed testimony was that when a driver leaves laundered goods with a customer without getting the money for the work, he is responsible for the money to the company, and that he went there "of his own accord to get his own money." This branch of the case is well illustrated in *McDermott v. Brewing Co.*, 105 La. 124. In that case a driver of the defendant delivered beer to a customer, upon a sale for cash which he was required to collect on delivery or be charged personally with the amount. He failed to collect at the time of delivery, and when he subsequently called for that purpose he got into an altercation with one of the customer's servants over the matter, and assaulted him and took back the unused beer to his employers. In a suit against the company for this assault, it was held not liable. The Court said, "The act of this driver was not in furtherance of the company's business nor in the protection of its interests. The defendant had not sent him to collect, nor was it interested in recovering losses by pursuing the violent methods which it pleased the driver to pursue. * * * He thereby sought to protect his own interests. * * * His employer had made provision to protect itself in case of the driver's failure to collect. * * * By the effect of the agreement between the defendant and the driver, it had become the latter's business." This language is as sensible as it is just. *Quoad* that transaction, the relation of master and servant had no existence. The same view was expressed in *Feneran v. Singer Co.*, 20 N. Y. App. Div. 574.

There was no evidence of ratification of Saffran's act by defendant. Ratification requires proof of full knowledge of all material facts, and upon this point the record is absolutely silent. There is not a word to show that the defendant knew the blankets had ever been delivered to the plaintiff, or that any assault had been committed or even charged. The letter of Messrs. Yellott & Symington throws no light upon this question. It is simply a notice to call at the laundry, pay

the charges and take away the blankets, and it is nothing more. Such a notice is a natural and proper mode of calling attention to the debt and getting rid of completed work. It would require a reckless stretch of imagination to deduce from such a notice knowledge by defendants of the alleged assault, with all its circumstances, and a purpose to approve and ratify it.

For these reasons we are of opinion the defendant's second prayer was properly granted, and the judgment will be affirmed.

Judgment affirmed with costs to the appellee above and below.

CHARLES A. SIMS ET AL. vs. AMERICAN ICE COMPANY.

Negligence—Fire Caused by Sparks from Dinkey Engine—Evidence—Instructions to Jury—Entries Made in Course of Business by Person Beyond the State.

The defendants, in the course of doing of certain railroad construction work, laid a track within a few feet of plaintiff's ice house and outbuildings, and operated on the track certain dinkey engines and dirt cars. The declaration alleged that these engines were not supplied with spark arrestors or netting; that they were negligently operated, and that plaintiff's house was set on fire and destroyed by sparks thrown out by one of the engines. Upon the trial of the action, *held*, that evidence is admissible to show that the dinkey engines had thrown out sparks shortly before the fire broke out in plaintiff's house, and that these sparks had set fire to combustible material near the track.

Held, further, that evidence that engines of a railroad company, operated in the county, had been seen to throw out sparks is not admissible, because that fact is in no way connected with the fire in question.

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Entries in a book relating to the inspection of locomotives, made in the course of his duty by a person now absent from the State, are admissible in evidence upon proof of his handwriting.

When the defendant in an action to recover damages for a fire alleged to have been caused by sparks from his engine, offers evidence to show that an engine of a railroad company had thrown out sparks sufficient to have caused the fire, and about the same time, the plaintiff is entitled to offer evidence in rebuttal showing that the fire was not caused by the engine of the railroad company.

In an action where the evidence showed that the defendant operated dinkey engines within a few feet of plaintiff's house; that these engines had no spark arrestors in them, and no netting in the smoke boxes, and that they constantly threw out quantities of sparks near plaintiff's house, the jury was instructed, at the instance of the plaintiff, that if they find that the plaintiff's house was destroyed by fire communicated from the defendant's engines and that the defendant did not exercise reasonable care to avoid, as far as practicable, injury to property along the line of the road upon which his engines were operated, by having said engines properly constructed and in good condition, then their verdict must be for the plaintiff. The jury was also instructed at the instance of the defendant that it was necessary for the plaintiff to prove by a preponderance of testimony, first, that the locomotive of the defendant emitted the sparks that set fire to plaintiff's house, and second, that the defendant was guilty of negligence in the management of the engine that emitted the sparks that set fire to the house. *Held*, that under these prayers, the jury was properly instructed as to the law of the case.

Decided December 4th, 1908.

Appeal from the Circuit Court for Harford County (VAN BIBBER, J.)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

John S. Young and M. H. Fahey (with whom was *Albert Constable* on the brief), for the appellant.

John C. Rose (with whom was *Stevenson A. Williams* on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

The appellee, a body corporate, brought this action against the appellants to recover damages for the destruction by fire of certain property situate on the east bank of the Susquehanna river, in proximity to a railroad operated by the appellants near Frenchtown, Cecil County, Maryland.

The suit was instituted in the Circuit Court for Cecil County, but on suggestion of the defendants, the case was removed to the Circuit Court for Harford County. The second trial of the case resulted in a verdict for the plaintiff for the sum of \$8,000, and from the judgment entered thereon the defendants have appealed.

The record in the case presents sixteen bills of exceptions. Fourteen of them relate to the rulings of the Court upon the evidence. The seventh exception was abandoned at the hearing, and the sixteenth was taken to the action of the Court in granting the plaintiff's prayer, and in rejecting the defendants' first, second, third, fourth, fifth, sixth and eleventh prayers, and in overruling the defendants' exception to the plaintiff's prayer.

The defendants' seventh, eighth, ninth and tenth prayers were granted and will be hereafter considered in the discussion of the propositions of law raised on the various exceptions set out in the record.

It appears from the evidence that the appellee, at the time of the fire, was the owner of an ice-house with certain appurtenant buildings, consisting of a stable, engine, boiler house, etc. The ice-storage house contained 6,600 tons of ice, worth \$1.11 a ton.

The appellants were engaged at the time of the fire in certain railroad construction work for the Pennsylvania Rail-

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road Company, and were operating what are called dinkey engines of about ten ton weight, hauling cars with dirt and other material over tracks laid for the purpose from a point on the P., B. and W. R. R. to a point on the C. & P. D. R. R. These construction tracks were located about six to ten feet distant from the ice-house, and ran along the east front of the property of the appellee, between the Pennsylvania Railroad track and the ice-house. The fire occurred about twenty-four minutes after ten o'clock, on the morning of June 16, 1905, and in the end of the ice-house next to the railroad.

The ice-house measured 90 feet 7 inches from east to west by 160 feet 4 inches from north to south. It was 93 feet 3 inches from the northeast corner of the ice-house to the centre of the Baltimore and Ohio Railroad (the bridge across the Susquehanna River); from the northwest corner of ice-house to centre line of Baltimore and Ohio Railroad, is 80 feet, and 64 feet from the northwest corner of the ice-house to the pier of the railroad company. The tracks of the Pennsylvania Railroad also passed along the east side of the ice-house. The nearest of those tracks being about 20 feet from the ice-house.

The declaration alleges that the property was destroyed by fire caused by sparks thrown out by an engine which was operated by the defendants on a railroad in close proximity to the plaintiff's ice-house. The negligence was charged to have consisted in the selection and equipment of the engines furnished and by the lack of ordinary care in the operation of the engines by the defendants' employees.

The first question presented by the record arises upon the first, second, third, fourth, fifth and sixth exceptions, and relates to the admission of testimony of various witnesses to the effect that they had seen the dinkey engines, when working near the plaintiff's property, throw sparks shortly before the fire, and that these sparks had set fire to combustible material near the dinkey tracks.

The Court, we think, properly overruled the objections to this testimony and permitted it to be given to the jury. In

Annapolis & Elkridge R. R. Co. v. Gantt, 39 Md. 115, and in *Green Ridge Railroad Co. v. Brinkman*, 64 Md. 53, this character of testimony was held to be admissible for the purpose of establishing the fact from which the jury may find negligence on the part of the defendant. JUDGE BARTOL, in delivering the opinion of the Court in *Gantt's Case, Supra*, said: Here the evidence was confined to the time of the occurrence, within a week of the happening of the fire on the plaintiff's property, and pointed directly to the condition of the defendant's engines, tending to prove that they were not in suitable repair at the time of the injury, and we think both upon reason and authority it was admissible for the purposes mentioned. All of these exceptions present the same legal question and for the reasons stated we are clearly of opinion that the testimony was properly admitted.

But apart from the admissibility of the testimony objected to in these exceptions, the witness Lewis had previously testified, without objection, that on the morning of the fire, as on previous mornings, he saw the dinkey engines of the defendants at work, and just before they got to the ice-houses they would open, exhaust and throw cinders ten or fifteen feet high out of stack, greater the blast more cinders would fly out of the stack, and his testimony was not subsequently excluded.

The testimony contained in the eighth exception was properly rejected. The fact that engines on the Baltimore and Ohio Railroad, while passing through different sections of Harford County, would throw out sparks and fire sufficient to set fire to rubbish and other inflammable materials, could throw no light upon the question whether the fire complained of here was caused by the engines of the defendants. It did not tend to show negligence in the case under consideration and was no way connected with the fire in question. It was too remote and simply tended to prove that an engine was capable of setting fire to property near its railroad.

The ninth, tenth, eleventh, twelfth, thirteenth and fourteenth exceptions were taken to the admission in evidence of certain entries made by one Wall, who had been inspector

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of engines in the service of the Baltimore & Ohio, as to the inspection of locomotives made by him.. These entries were made in a book of the B. & O. Railroad and were made at the time of the inspection of the engines. The entries were in the handwriting of Wall, who had left the service of the road and was absent from the State, and his whereabouts unknown. The witness Given testified that they were in the handwriting of Wall and were made in the regular course of official duty.

We find no error in the admission of this testimony. In *Heiskell v. Rollins*, 82 Md. 15, it was said: It has long been held, that entries made by a clerk in the regular course of business, he having no interest at the time in stating an untruth, should be received in evidence after the clerk's death on proof of his handwriting, and such entries are equally admissible where the witness is absent from the State. *Reynolds v. Manning & Co.*, 15 Md. 523; *Morris & Co. v. Columbia Iron Works*, 76 Md. 357.

The fifteenth exception was taken to the action of the Court in overruling a general objection to certain witnesses being allowed to testify in rebuttal. We do not deem it necessary to go into a recital of the testimony embraced in this exception. An examination of the record will show it was strictly and directly in rebuttal of the evidence by the defendants' witnesses to the effect, that a Baltimore & Ohio Railroad freight train, bound east, passed the east end of the bridge about the time of the fire, throwing out smoke and cinders, and shortly afterwards the ice-house was seen on fire. The evidence was clearly competent for the purposes offered, and being evidence in rebuttal was largely in the discretion of the trial Court.

We come now to a consideration of the rulings of the Court upon the prayers set out in the sixteenth exception. The plaintiff's prayer is as follows: "The jury are instructed that if they shall find from the evidence that the plaintiff's ice-houses with their contents were destroyed by fire communicated from the defendants' engines, and shall further find

that the defendants did not exercise reasonable care and diligence to avoid as far as practicable injury to the property along the line of the road upon which their engines were operated by having their said engines properly constructed and in good condition, then their verdict must be for the plaintiff."

This prayer as applicable to the facts of this case is entirely free from objection and was properly granted by the Court. There is testimony in the record tending to establish every hypothesis of the prayer, and the special exception, that there was no evidence that the defendants' engines were not properly constructed, was rightly overruled. There was evidence that the dinkey engines had no spark arrestors in them at the time of the fire; that they had been taken out, and none of them had netting in their smoke box. There was also evidence to the effect, that the Tyrone, one of the engines, stopped in front of the ice-house before the fire, and that it had no spark arrestor in it. In *Ryan and McDonald v. Gross*, 68 Md. 380, the Court held, it was the duty of the defendants to see that the spark arrestor was in proper repair, and if it was not in proper repair, in consequence of which sparks escaped from the engine and set fire to rubbish along the road, and spread thence to the plaintiffs' land these facts were sufficient to justify the jury in finding negligence on the part of the defendants and that the destruction of the plaintiff's property was the direct and natural consequence of such negligence. But apart from this, the jury were instructed by the defendants' ninth prayer, "that to entitle the plaintiff to recover in this case, it must prove by a preponderance of testimony two facts, first, that the locomotives of the defendants emitted the sparks that set fire to the ice-houses of the plaintiff; second, that the defendants were guilty of negligence in the management of the engine that emitted the sparks that set fire to the ice-houses of the plaintiff. And if the testimony in this case should be such as to leave the minds of the jury in a state of equipoise as to either of the facts, their verdict must be for the defendants." And by the defendants' eighth prayer, the

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jury were further told that "if from the evidence it is equally probable that the fire originated from any cause, other than the defendants' engines, the defendants are not liable in this action, and their verdict must be for the defendants. That the defendants cannot be made liable in this action on a mere probability that the fire was caused by its engines, but only on the preponderance of proof that it was so caused, and then only upon proof of negligence on the part of the defendants."

The theory of the defendants' case, we think, was fully submitted in their granted prayers, and they obtained all the law to which they were entitled. The defendants' first, second, third, fourth, fifth, sixth and eleventh prayers were properly refused. The first, second, third and fourth prayers were demurrers to the evidence and could not, under the facts of the case, have been granted.

The fifth and sixth prayers submitted the same propositions covered by the defendants' eighth and ninth prayers, and were properly refused. The eleventh prayer was manifestly erroneous. It asserted a proposition not bearing upon the case, and its rejection could not have injured the defendants.

Finding no error in the rulings of the Court, and, as the case was one to be submitted to the jury upon the facts, the judgment will be affirmed.

Judgment affirmed, with costs.

HARRY D. WILLIAR vs. GEORGE A. NAGLE ET AL.

Action by Architect to Recover Compensation for Plans—Cost of Building in Excess of Estimate—Conflict Between Granted Instructions to the Jury—Prayer Failing to Submit Finding of Fact to the Jury.

If an architect is employed to prepare plans and specifications for a building which is to cost not more than a certain sum,

he is not entitled to compensation unless the building can be constructed under his plans at a cost reasonably near that designated in the estimate.

Ordinarily, the question whether a building can be constructed under the architect's plans at a price which reasonably approximates the designated estimate should be submitted to the finding of a jury.

But when an architect is employed to make plans for a building whose cost is not to exceed \$90,000, and the lowest bid received for its construction under his plans is for \$125,000, the Court may rule, as matter of law, that his estimate did not reasonably approximate the cost of construction.

In an action by an architect to recover compensation for building plans prepared by him, the defendant alleged that there was either an express agreement between them that the plaintiff was to receive no compensation for his services unless the building could be erected according to his plans for a sum not to exceed \$90,000, or that there was an implied agreement or condition to that effect. The lowest offer received by defendant for the erection of the building, under the plans furnished by plaintiff, was for \$125,000. The trial Court granted a prayer offered by the plaintiff to the effect that he was entitled to recover unless the jury found that it was distinctly understood and agreed that he should not receive any compensation unless the building to be constructed under his plans, would cost less than a certain sum, and that the same could not be built for that sum. The trial Court also granted defendant's prayer instructing the jury that if they found that the plaintiff undertook to prepare plans for a building to cost not over \$90,000, and that the plaintiff prepared plans for such building, and requested bids thereon, and that the lowest bid received was \$125,000, then their verdict must be for the defendant. *Held*, that the defendant's prayer is not a mere modification of that of the plaintiff, but there is a direct conflict between the two; that under the plaintiff's prayer he was declared to be entitled to recover unless the jury found that there was an express agreement as to the cost of the building, while the evidence showed also an implied agreement to that effect, which would be equally a bar to plaintiff's recovery,

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and this defense was presented by the defendant's prayer; and that since the jury may have been misled by this repugnancy between the prayers, the granting of them separately constituted reversible error.

In said action another prayer offered by the defendant instructed the jury that if they found that there was an understanding between plaintiff and defendant, that the services for which suit was brought, should not be paid for unless a building could be erected according to the plans prepared by the plaintiff for a sum not exceeding \$90,000, then their verdict must be for the defendant. *Held*, that this prayer is erroneous because it does not submit to the jury the question whether the building could be erected for the sum mentioned. This error is not cured by the fact that the account filed by the plaintiff with his declaration, which was under the Baltimore City Practice Act, admitted that the lowest bid for the erection of the building was for \$125,000.

Decided December 4th, 1908.

Appeal from the Superior Court of Baltimore City (ELLIOTT, J.)

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

Armstrong Thomas (with whom was *Roger W. Cull* on the brief), for the appellant.

John E. Semmes, Jr., and *Wm. Fell Johnson, Jr.* (with whom was *John E. Semmes* on the brief), for the appellees.

BOYD, C. J., delivered the opinion of the Court.

The appellees, who are architects, sued the appellant on an account which reads as follows: "To architectural services rendered in preparing working drawings and specifications from January to March, 1906, for apartment house at the northeast corner of Charles and Read streets. Two and one-

half per cent. on lowest estimate—\$125,000.00—\$3,125.00.” They obtained a verdict for \$2,075, and the questions arising on this appeal are on the exceptions to the rulings of the lower Court in granting the plaintiffs’ first and in rejecting the defendant’s second prayer. The defendant contends that the plaintiffs undertook to prepare plans for a building, the cost of which would not exceed \$90,000.00—one line of the defense being that the work was undertaken by the plaintiffs under an *implied* condition that they were to receive no compensation for their services unless a building could be erected according to the plans prepared by them, for a sum not to exceed that amount, and another being that there was an *express* agreement to that effect. The testimony offered by the respective parties is conflicting—the plaintiffs denying that there was such an understanding or agreement, either express or implied, while the defendant offered some evidence tending to sustain both of his defenses.

By the plaintiffs’ first prayer, the jury was instructed that “if they find that the plaintiffs are architects and the defendant employed them to prepare plans and specifications for a building to be erected on the lot on the corner of Charles and Read streets, owned in part by the defendant; and they further find that the plaintiffs did prepare such plans and specifications, then the plaintiffs are entitled to recover, unless the jury find that it was *distinctly understood and agreed by the plaintiffs* that they should not be entitled to receive any compensation for their services unless the building to be constructed under their plans would cost less than a certain sum of money and that the same could not be built for the sum of money so specified.”

The qualification of the prayer—“unless the jury find that it was distinctly understood and agreed by the plaintiffs,” etc.—is what is complained of by the appellant, as he contends that was not a proper statement of the law, and that even if it be conceded that it did sufficiently instruct the jury as to one of the defenses, it ignored the other, and hence there was reversible error. There would seem to be no doubt

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that the prayer is not sustained by the authorities, if we are confined to it alone. If an architect be employed to prepare plans for a house to cost not more than five thousand dollars, he cannot, under that employment, recover for a house which would cost ten thousand dollars. The latter might be of no use whatever to the employer, for he might not be financially able to erect a house at such cost, or, if he was, he might not be desirous of doing so. A dishonest architect could easily impose on his clients if such were the law. Indeed, we do not understand counsel for the appellees to contend in this Court that there must necessarily be a *distinct agreement* on the part of the architect not to charge for his services unless the building can be constructed at a cost reasonably near the estimate. It is said in their brief: "It is conceded that the general principle of law governing the transactions between the owner and architect with regard to the preparation of plans and specifications for a building is, that if the architect makes an estimate of the cost of the building he is not entitled to his fee, unless the building be constructed at a cost reasonably near that estimated or agreed upon." In their brief they quote from *Wait on Engineering and Architectural Jurisprudence*, Ch. 33, paragraph 860, that: "An architect employed to prepare plans and specifications of a building and furnish an estimate of the probable cost is not, upon submitting the same, entitled to his fees, unless the building can be erected at a cost reasonably approximating that stated in such estimate." They also quoted from 6 *Cyc.* 30, that "A person employed as an architect to furnish a plan is entitled to remuneration therefor, if made in accordance with the directions of the owner; but he cannot recover, where the owner stipulates that the plan should be for a building not to cost over a specified amount, if the plans made are for a building exceeding that sum."

The law as stated by the appellees does not materially differ from that contended for by the appellant, who also relies in part on 6 *Cyc.* 30, and some of the cases cited by the appellees. If the cost of erecting a building is "reasonably

near," or "reasonably approximates" (as some of the authorities express it), that stated in the estimate or understanding of the parties, the owner might very properly be held liable—certainly in many cases—for he knows, or as a man of ordinary intelligence may be presumed to know, that there may be some slight variance between the estimate and the actual cost of the building. *Feltham v. Sharp*, 99 Ga. 260; *Nelson v. Spooner*, 2 Foster & Finlason, 613; *Wait on Eng. and Arch Juris.*, *supra*. Ordinarily, that question should be submitted to the jury, unless there be a written contract which has to be entirely construed by the Court and has no provision in it which should be submitted to the jury; but in a case like this, where it was contended that the building to be erected was not to exceed \$90,000, while the lowest bid was \$125,000, the Court could declare, as a matter of law, that the estimate did not reasonably approximate the cost, which the lower Court in effect did in granting the defendant's first and third prayers. In addition to the authorities above referred to, see 2 *Am. & Eng. Ency. of Law*, 818; *Maack v. Schneider*, 57 Mo. App. 431; *Wees v. Warren*, 72 Mo. App. 644; *Ada St. M. E. Church v. Garnsey*, 66 Ill. 132; *Paul v. Los Angeles Co.*, 74 Cal. 502; *Smith v. Dickey*, 74 Tex. 61; 1 *Hudson on Bldg.* 70, although some of them do not discuss the question fully.

While the Court below seems to have adopted the doctrine announced by the authorities, it must have either overlooked the effect of the language used in the plaintiffs' prayer, or concluded that the defendant's first and third prayers sufficiently modified it. It is contended by the appellees that the latter are not in conflict with their first, but constitute merely a modification or qualification of the law announced in it. But is that correct? It is true that this Court has decided in a number of cases that a defect in a prayer, which by itself might be objectionable, may be cured by others which are granted, but are those cases applicable to this? Compare for example the defendant's third prayer with the plaintiffs' first. It instructed the jury that if they found that "the

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plaintiffs undertook to prepare plans and specifications for a building to be erected in Baltimore City to cost not over \$90,000.00 and that the plaintiffs prepared plans and specifications for such building and requested bids thereon, and that the lowest bid received was \$125,000.00, then their verdict must be for the defendant." That is not a mere modification of the plaintiffs' prayer, but it is in direct conflict with it. In the one, it was said the plaintiffs could recover "*unless* the jury find that it was distinctly understood and agreed by the plaintiffs that they should not be entitled to receive any compensation for their services," etc., while in the other, the jury was instructed, in substance, that it was not necessary that there be such understanding and agreement, for that is the effect of both of the defendant's prayers which were granted. In other words, it was not necessary, in order to defeat recovery by the plaintiffs, for the jury to find an *express* agreement on the subject, but if they found that the plaintiffs were employed to prepare plans for a building not to cost over \$90,000 and furnished them for a building which would cost at least \$125,000, the plaintiffs could not recover, yet the qualification in the plaintiffs' prayer was confined entirely to the one defense.

When then the jury retired to their room with these conflicting instructions, what were they to do? If they would first read the plaintiffs' prayer, and then the defendant's prayers, it is not reasonable to suppose that they would conclude that the Court merely intended to submit the qualifications in the alternative—unless they found the *express* agreement referred to in the plaintiffs' prayer or the *implied* condition in those of the defendant. If it be said that was possible, or even probable, we cannot be certain that such was the case, if we assume the Court so intended. Prayers may be so drawn that although the one does not include the whole case, another does in such way as to avoid the danger of misleading the jury, but this prayer of the plaintiffs instructed the jury that if they found certain facts, which were not disputed, the plaintiffs were entitled to recover, *unless* they found *one*

other fact— although there was evidence of *two* facts, either of which was sufficient to prevent recovery, but the Court did not say so in that prayer. If the jury found against the defendant on the qualification in the plaintiffs' prayer then there was nothing to do under it but find a verdict for the plaintiffs. Then when they took up the defendant's prayers, or either of them, they would see, in the first place, that there were no words used to connect them with the plaintiffs' prayer—nothing to show that they were intended to submit another qualification of it—but if they found for the defendant as to the facts submitted to them in his prayers they might well have thought "it is true the Court has instructed us that if we find these facts our verdict must be for the defendant, but it said in the plaintiffs' prayer that the plaintiffs were entitled to recover, '*unless* it was distinctly understood and agreed by the plaintiffs that they should not be entitled to recover any compensation for their services unless the building to be constructed under their plans would cost less than a certain sum of money,' and, therefore, as we do not find that it was so distinctly understood and agreed by the plaintiffs, we must find our verdict for the plaintiffs." So it seems to us that if we assume that the defendant's prayers were intended to be a further modification of the plaintiffs' first prayer, they were, in the manner submitted, calculated to mislead the jury, and were in fact contradictory—the plaintiffs' theory being, as shown by the prayer, that nothing short of an *express* understanding or agreement could bar a recovery, while those of the defendant presented the opposite theory, namely, that the contract could be *implied* from the facts stated in them. As was said of two conflicting prayers in *B. & O. R. R. Co. v. Blocher*, 27 Md. 286, "The theories of these prayers were, *prima facie*, directly opposed. The jury could not, without disregarding one or the other, come to any correct conclusion." The jury might have reasoned: "we cannot tell which prayer we must be governed by, and although we think the defendant's evidence sustains the facts set out in his prayers, yet, as we be-

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lieve the plaintiffs did not distinctly agree that they should only be entitled to compensation for their services as set out in their prayer, we are authorized by that to find our verdict for the plaintiffs, and as they did actually render the services they ought to be paid for them." We cannot therefore treat the defendant's prayers as mere modifications or qualifications of that of the plaintiffs', and are of the opinion that there was reversible error in granting the latter.

The defendant's second prayer, which was rejected, was: "If the jury shall find from the evidence that there was an understanding or agreement between the plaintiffs and the defendant, that the services for which suit is brought should not be paid for unless a building could be erected according to the plans and specifications prepared by the plaintiffs for a sum not exceeding \$90,000.00, then their verdict must be for the defendant." We find no reversible error in rejecting that prayer. In the first place that theory of the defendant was so submitted in the plaintiffs' first prayer that we do not see how he could have been injured, but in addition to that it did not submit to the jury the question whether the building could be erected for the sum stated. We understand the appellant to rely mainly on the fact that the account filed by the plaintiffs admitted that the lowest bid was \$125,000, but this was originally a suit under the Practice Act of Baltimore City. When the defendant appears in such action, and complies with the requirements of the statute, the case is then placed on the Trial Docket and is governed by the ordinary rules of procedure in actions *ex contractu*. The plaintiff can claim any thing recoverable under his declaration, and the defendant can avail himself of any defense or evidence admissible under his pleas. The plaintiff is not confined to the cause of action originally filed with the declaration, and he and the defendant are not bound or prejudiced by the affidavits originally made under the Practice Act, "except in so far as the respective averments of these affidavits may strengthen or weaken the other testimony of the party making the affidavits," *Councilman v. Towson Bank*, 103 Md. 469, and cases

therein cited. The prayer ought to have submitted the question whether the cost of the erection of the building would exceed the sum named.

For error in granting the plaintiffs' first prayer, the judgment will be reversed.

Judgment reversed and new trial awarded, the appellees to pay the costs, above and below.

CLINTON MEUSHAW vs. STATE OF MARYLAND.

Municipal Corporations—Validity of Ordinance of Baltimore City Imposing a Tax upon Dealers in the Wholesale Produce Market—Time of Payment of Licenses in Baltimore City.

An ordinance of Baltimore City established a wholesale produce market and provided as follows in one of its sections: "All dealers and commission men shall pay in advance two hundred dollars per annum for the use and privilege of selling in this market. Wholesaling in the public streets is unlawful." The City Charter, Sec. 6, confers on the Mayor and City Council full power and authority "to license, tax and regulate all businesses, trades, avocations or professions;" and also to license and regulate the sale of fresh fruits, meats, vegetables and all other perishable articles. *Held*, that under the charter, the City had the right to impose this tax for revenue upon dealers selling in the produce market.

Held, further, that the tax is not unreasonable in amount in view of the privileges granted and of the cost of erecting and maintaining the market.

Every fair intendment should be made in favor of the reasonableness of a license tax imposed by a municipal corporation acting within the scope of its authority.

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The ordinance of Baltimore City providing that persons selling in the wholesale produce market should pay two hundred dollars per annum in advance for the privilege of so doing was approved May 20th, 1907. One section of the ordinance provided that licenses for selling shall begin on May 1st of each year and must be paid by May 10th of each year. The appellant was indicted for selling at wholesale in said market in June, 1907, without a license. *Held*, that the appellant was not entitled to sell in said market during the year 1907 without paying the tax imposed by the ordinance.

The provision in Sec. 59 of the Baltimore City Charter, that "all licenses imposed by ordinance shall be due and collectible in the first week in January in each year," does not apply to the revenue tax imposed by the Ordinance of 1907 upon persons selling in the wholesale produce market.

Decided December 2nd, 1908.

Appeal from the Criminal Court of Baltimore City
(WRIGHT J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and WORTHINGTON, JJ.

M. R. Walter and J. Charles Linthicum, for the appellant.

Isaac Lobe Straus, Attorney General, for the appellee.

BURKE, J., delivered the opinion of the Court.

The Mayor and City Council of Baltimore, by Ordinance 283, approved May 20th, 1907, made provision for the erection and maintenance of a wholesale produce market in Baltimore City. Section 101 of the Ordinance defined the limits of the market; section 102 provided that it should be used solely for the purpose of wholesaling all produce and fruits brought to Baltimore in vehicles, and that retailing therein should be unlawful; section 104 declared that no permanent

structures of any character should be erected within the market; section 105 provided that the market should be open every day in the week, except Sundays and holidays, between the hours of three o'clock A. M. and six o'clock P. M., and should be thoroughly cleansed every market day after five o'clock P. M.

Sections 106 and 107, which give rise to the important legal questions presented by the record, are as follows:

"106. All dealers and commission men shall pay in advance two hundred dollars per annum for the use and privilege of selling in this market. Wholesaling in the public streets is unlawful. 107. License for selling shall begin May 1 of each year, and must be paid by May 10 of each year, otherwise the same shall be void."

Section 108 imposes certain duties upon the assistant market master, and makes it unlawful for anyone to interfere with him in the discharge of his duties. It then provides that "anyone failing, or refusing to observe, or violating the provisions and requirements of Section 106 to 108 shall be deemed guilty of a misdemeanor, and shall be subject to a fine of ten dollars for each and every offense, the same to be collected as other fines and penalties are collected."

Clinton Meushaw, the appellant, was indicted and convicted in the Criminal Court of Baltimore for violating the provisions and requirements of this Ordinance, and was adjudged to pay a fine of ten dollars and costs. From this judgment he has brought this appeal. The indictment contains six counts; but the fourth and fifth counts were quashed by the Court at the request of the State's Attorney. It is unnecessary to set out the averments of the remaining counts. They each substantially charge that on the 29th of June, 1907, the appellant being a dealer and commission man engaged in selling produce and fruits at wholesale in the whole-sale produce market of Baltimore City, did sell at wholesale in said market produce and fruits brought to said City and market in wagons, without having paid two hundred dollars per annum for the use and privilege of selling produce and

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fruits in said market, in violation of Sections 106 and 108 of the above mentioned Ordinance. The traverser demurred to each count of the indictment, but the Court overruled the demurrer, and the case proceeded to trial upon the joinder of issue upon the appellant's plea of not guilty.

The State offered in evidence Sections 101, 102, 103, 104, 105, 106 and 108 of the Ordinance above mentioned. It then produced Mr. Harry Hooper, the City Comptroller whose duty it is to collect the market rentals and license fees, who testified that he had the record of the persons who occupied the wholesale produce market during the year 1907, and of those who paid the rentals or license fees for that year required by the Ordinance offered in evidence which is two hundred dollars, and that the traverser did not pay said sum. It then called Mr. Sanner, the assistant market master at Centre Market, which includes the wholesale produce market, who testified that he visited the market daily from May 20, 1907 to July 1, 1907, and that continuously during that period he saw the traverser, who was a wholesale produce dealer, or commission merchant, selling at wholesale all sorts of produce, fruits, and strawberries; that he sold in the wholesale produce market whenever he could get his wagon in; that the produce reached the market by wagons, and was sold by the wagon load within the limits of the market, and in one of the said aisles which ran through the market; that the traverser never paid the fee of two hundred dollars required by the Ordinance, but refused to pay the same, and that after his refusal to pay he continued to sell as a commission merchant until July 1. This witness on cross-examination said that the seven aisles were driveways with seven openings, running from the east to the west, from Market Space to West Falls Avenue, straight through the market. The following questions were asked the witness on cross-examination: "1. Suppose a wagon went in one of these aisles, could it get in the other aisle?" "2. Suppose a wagon in that aisle would sell its goods before a wagon ahead of it, could the wagon which had sold get out?" "3. Where was

Mr. Meushaw selling before the market was completed?" "4. Did you notify him that he must go to this market?" The Court, upon objection by the State refused to allow the witness to answer these questions, and these rulings constitute the appellant's first, second, third, and fourth bills of exception.

Charles H. Schenkel was called and testified that Meushaw did business in the wholesale produce market during the whole season of 1907, that is during July, August, and September of that year; that he sold produce by the wholesale, which is brought in country wagons, and sold from the wagons, the wagons being somewhere in one of the seven aisles. On cross-examination the witness was asked the following questions which the Court, upon objections by the State, would not permit him to answer: "1. Was there any special aisle assigned to any of these commission merchants?" "2. Can you explain to the jury how these aisles are constructed?" These rulings are made the subject of the traverser's fifth and sixth bills of exception. He then offered to read to the jury Section 107 of the Ordinance; but the Court would not allow it to be read in evidence. This ruling constitutes the seventh and last bill of exception.

With this statement of the material facts we are prepared to consider the reasons urged by the appellant in support of the demurrer. It is said that the charge of two hundred dollars imposed by Section 106 of the Ordinance is void: First, because it is unreasonable. Second, because it is not uniform as to all produce dealers and commission men. Third, because there is no authority under the Charter of Baltimore City given to the Mayor and City Council to impose such a charge for the use of the market. Fourth, that if the Ordinance be not invalid for any or all of these reasons, it is contended that the appellant had not violated any of the provisions of the Ordinance if Section 107 be valid, because the charge imposed by Section 106 was not payable for the year 1907 since the Ordinance was not approved until May 20, 1907, and, therefore, the requirement of that section could

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not become operative or binding upon the traverser until May 1, 1908; but, it is further contended that if that Section be invalid, the demurrer should have been sustained, because by Section 59 of the City Charter the license imposed was not due and collectible until the first week of January, 1908.

As the demurrer denies the power of the City to pass the Ordinance it is proper in the first place to advert to the general rule respecting the construction of municipal powers. In *St. Mary's Industrial School v. Brown*, 45 Md. 310, this Court, speaking through Judge Alvey, stated the rule in these words: "And first and principally, we must bear in mind that all such powers are delegated, and depend upon legislative charter or grant; and that the corporate authorities can exercise no power which is not, in express terms, or by fair and reasonable implication, conferred upon the corporation. In construing a grant of municipal powers, in the case of *Minturn v. Larue*, 23 How. 435, the Supreme Court of the United States but announced a well established rule when it said, 'It is a well settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the Act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers, that we need not stop to refer to the authorities.'"

This is conceded to be the universally accepted rule, and a citation of the numerous cases in this Court in which it has been applied is unnecessary. In this case it is not denied that the City has the power to erect, regulate, or maintain the market, or to license and regulate the sale of fresh fruits, meats, vegetables, and all other perishable articles in the City of Baltimore, because this power is expressly conferred upon the Mayor and City Council by Section 6 of the Charter. The City had the unquestionable right under the

powers conferred by that Section to regulate the sale of produce in Baltimore City.

It was contended at the hearing that, the cases of *State v. Rowe*, 72 Md. 550; and *Vansant v. The Harlem Stage Company*, 59 Md. 334 have conclusively settled the invalidity of this license upon two grounds: first, because of its unreasonableness; and secondly, because of the want of power in the City to impose it. In *Rowe's* case this Court held invalid an Ordinance of the Mayor and City Council of Baltimore providing that no person should be permitted to use Centre Market for the sale of fish and crabs without first paying to the Clerk of that Market one hundred dollars yearly for the license provided in Section 2 of the Ordinance. It was sought to uphold the Ordinance as a lawful exercise of the power conferred upon the City "to erect and regulate markets" and "lease, sell, and dispose of the stalls and stands in any manner and for any term it might think proper." In reply to this contention the Court said: "A fair and reasonable construction of this power can only give the City authorities, as owners of the market houses, the power of selling and leasing the stalls in their buildings as they may judge fit, and the power to regulate the markets, given by Section 671, can only be held to intend to give reasonable police powers with reference thereto." The Court then noticed the *Vansant case, supra*. In that case the Mayor and City Council, under the power conferred by the Act of 1880, Chapter 69 to license carriages and all vehicles, including carts, drays, omnibuses, wagons, etc., and "to license and regulate" the employment of hackmen, draymen, etc., and imposed a tax of seventy-five dollars on each omnibus, and fifty dollars on every renewal. The Court held this tax void, because it was a clear attempt on the part of the City to exercise a power which had not been granted. "As the word 'tax,'" say the Court, "was no where to be found in the law, they could not hold under that law anything more than the bestowal of a police power; and that although the power to license and regulate gave it the power to impose some tax, it was the mere

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incident to the main purpose of the law, and only the means of carrying the law into effect."

But we think it perfectly clear that the question we are dealing with is not controlled by those cases. This is not a question of the exercise of mere police power, or of the power merely to license or regulate. Much larger and broader powers are granted to the City under the New Charter with respect to the subject matter we are considering than were possessed by it at the time the *Rowe* and *Vansant* cases were decided. Under Section 6. of the Charter the Mayor and City Council is given the power "to license, tax and regulate all businesses, trades, avocations or professions," and under this grant of power the City had the clear right to impose the charge of two hundred dollars "for the use and privilege of selling in this market." This conclusion, we think, is fully supported by the cases of *Mason v. Cumberland*, 92 Md. 451; *The Commissioners of Cambridge v. The Cambridge Water Company*, 99 Md. 501; and *State v. Applegarth*, 81 Md. 293.

The City has expended large sums in the erection and maintenance of this Market, and the charge exacted of the class of persons mentioned in the Ordinance is not strictly a license, or regulation tax, but is a tax for revenue imposed by the City upon persons engaged in the wholesale produce business in that market. The Court below upheld the Ordinance, "upon the right of the City to make a reasonable charge for the accommodations furnished, though under the new Charter vesting in the City the right to license, tax, and regulate all business, trades, avocations or professions authority therefor may be found."

Nor do we think the charge made can be said to be unreasonable. It is less than fifty-five cents per day for the enjoyment of the facilities and privileges afforded. This seems to be a moderate sum to be paid as compensation for the advantages conferred by the Ordinance. The Court, in any case, should be cautious in declaring a tax laid by competent authorities to be unreasonable, or excessive, because, as was

said in *Vansant's case, supra*, the Mayor and City Council of Baltimore are primarily at least the judges of what is a reasonable tax, and that if there be doubt upon the question a Court should be slow to revise the judgment of the City Council, and that every fair intendment should be made in its favor. There appears to be a general concurrence of authority that the power to license and tax occupations and privileges includes the power to license and tax as a condition precedent to entering upon and exercising such occupations or privileges, and that such taxes are not governed by the ordinary rules controlling property taxation.

The lower Court held Section 107 invalid. The Act is complete and effective without it, and to give it the construction contended for by the appellant would not only frustrate the real purpose and intent of the Ordinance, but would permit the class of persons named therein to use the market for the season of 1907, as the traverser did, and enjoy all of its privileges and advantages without cost. This would be most unreasonable and unjust to the City, and the Court correctly held that the payment of the charge was a condition precedent to the right to sell in the market.

Section 59 of the Charter, which declares that all licenses imposed by Ordinance shall be due and payable in the first week of January in each year, does not apply to, or include charges of the kind imposed by this Ordinance. It applies to purely license taxes. There is a broad distinction between revenue received from the exercise of the power to license and regulate, and revenue received under the power to tax. This Section has reference to money received or payable under the exercise of the first-named power. *Cooley on Taxation*, 598; *State v. Rowe*, 72 Md. 548; *Mason v. Cumberland*, 92 Md. 451.

What we have said disposes of the appellant's seventh bill of exception. We have in an earlier part of this opinion set out the questions embraced in the other exceptions. Three of these questions suggest that some changes in the arrangement of the market ought possibly to be made so as to afford

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better facilities and accommodations to persons using the market; but that is a matter exclusively for the Mayor and City Council to consider. We do not think it necessary to discuss the exceptions, as it will be apparent from reading them, that none of them has the slightest relevancy to the real issue which the jury was impanelled to try.

Judgment affirmed with costs.

THE GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LIMITED, OF PERTH,
SCOTLAND, *vs.* HARRIET HOMELY.

Accident Insurance—Death of Insured from a Disease Caused by External Accident—Instructions to the Jury.

There may be a recovery under an insurance policy against death caused by external and accidental agencies when the death of the insured resulted from a disease which was itself caused by an accident, for in such case the accident is to be regarded as the predominant cause of death, and the disease as a link in the chain of causation.

In one part of an accident insurance policy, the liability of the company was limited to injuries resulting from external and accidental agencies independently of all other causes. In a subsequent part of the policy, it was provided that in the event of injury, fatal or otherwise, of which there shall be no external or visible mark on the body, or injury, fatal or otherwise, or disability due wholly or in part, directly or indirectly, to disease or bodily infirmity, then the limit of the company's liability shall be one-fifth of the amount which would otherwise be payable under the policy. The insured while at work, on October 20th, in a stable, was struck on the back by a bale of hay and knocked down. There appeared after-

wards a welt upon his back and a tremor and tension of muscles, and on October 27th, he died from acute nephritis. Previous to the accident he was in apparent good health. The evidence of the attending physician was to the effect that a blow over the kidneys may cause acute nephritis, with uræmic poisoning, often resulting in death, and that the insured died of traumatic nephritis, the result of the accident. *Held*, that the jury was properly instructed, at the instance of the plaintiff, that if they found the above facts, and that the deceased was insured by the defendant, and that he was at the time of the accident free from disease, except acute nephritis caused by the accident, then their verdict must be for the plaintiff. This prayer does in effect, although not expressly, require the jury to find that the death was caused by an accident independently of all other causes.

Held, further, that the evidence in the cause was legally sufficient to show that the death of the insured was caused by the accident.

Held, further, that a prayer offered by the insurance company was properly rejected which instructed the jury that if, at the time of the accident, the insured was suffering from a pre-existing disease, in the absence of which the accident would not have caused his death, then their verdict must be for the defendant. It was also proper to reject a prayer which declared that the death must have been caused by the external injury alone. These prayers disregard the second clause of the policy which made the insurer liable to the extent therein stated for injury, fatal or otherwise, due wholly or in part to disease or bodily infirmity.

Decided December 9th, 1908.

Appeal from the Superior Court of Baltimore City (ELLIOTT, J.)

The cause was argued before BOYD, C. J., BRISCOE, SCHMUCKER, BURKE, THOMAS and WORTHINGTON, JJ.

Charles W. Main and John B. Boyer, for the appellant, submitted the cause on their brief.

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Jefferson D. Norris (with whom were *Edward B. Eisenbrandt* and *Robert B. Bacon* on the brief), for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

The appellee sued the appellant company in assumpsit in the Superior Court of Baltimore City upon a policy of insurance issued by it upon the life of her son, George H. Gardiner. The verdict and judgment below were in her favor for the full amount of the policy and the company took the present appeal.

The policy sued on is of the now familiar class which furnish indemnity to a designated beneficiary for loss accruing from accidental and external injuries, fatal or otherwise, to the assured. The expressions employed in the earlier part of the policy limit the liability of the company to losses resulting from external accidental agencies, "independently of all other causes," but in a later clause of the document a modified liability is distinctly assumed for loss from "injury, fatal or otherwise, or disability, due wholly or in part directly or indirectly to disease or bodily infirmity."

The portion of the policy providing for that modified responsibility of the company is known as clause (h), and is in the following language: "In event of injury or loss, fatal or otherwise, of which there shall be no external or visible mark on the body; or injury, fatal or otherwise, or disability due wholly or in part directly or indirectly to disease or bodily infirmity; * * * then and in all such cases referred to in this paragraph, the limit of the company's liability shall be one-fifth of the amount which would otherwise be payable under this policy, anything herein to the contrary notwithstanding."

The declaration in the case before us only avers an insurance against death resulting directly and independently of all other causes from bodily injuries effected through external, violent and accidental means, but declares upon the policy, designating it by its number and date.

There is but one bill of exceptions in the record, and that is to the Court's action on the prayers.

The plaintiff offered but one prayer, which the Court granted. It asked the Court to instruct the jury, "that if they shall find from the evidence that on October 20th, 1906, George H. Gardiner was insured in the Defendant Company against death by accident, and that upon that date the said George H. Gardiner sustained an injury through being struck by a bale of hay upon the back or side, and that upon the day following said accident there was a welt upon his back, and that on the fourth day after the accident an examination of the said Gardiner by two practicing physicians disclosed a tremor, tension and sensitiveness of the muscles of the back, and that on the 27th day of October, 1906, the said George H. Gardiner died of acute nephritis caused by the said accident, and if they shall further find that said Gardiner was at the time of said accident, and until his death, free from disease, except acute nephritis, caused by the accident, and that from and after the said accident he was unable to perform his duties, then their verdict may be for the plaintiff."

The Court rejected the defendant's first and third prayers, and granted its second prayer as modified, and its fourth prayer as originally offered.

The first of these prayers asked the Court to take the case from the jury for want of legally sufficient evidence to entitle the plaintiff to recover.

The second placed upon the plaintiff the burden of proof that the death of the insured was caused by external, violent and accidental means, and concluded with the words, "and if those injuries alone did not occasion his death, then the verdict must be for the defendant." The Court struck out the concluding words and granted the prayer as thus modified.

The third prayer declared that if the jury found from the evidence that at the time of the accident the insured was suffering from a pre-existing disease, in the absence of which the accident would not have caused his death, and that he died

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because the accident aggravated the disease or the disease aggravated the effects of the accident, then their verdict must be for the defendant.

There is evidence in the record tending to show the following state of facts: The assured was an unmarried colored man, about forty years of age, who had been employed for more than six years prior to his death at the Warwick stables in Baltimore City. He was a person of unusual strength, in apparently good health, and was uniformly industrious and attentive to his duties. He took an occasional drink of liquor, but was not intemperate in his habits. On Saturday afternoon, October 20th, 1906, when he was at work on the ground floor of the stable, a bale of hay was thrown down the hatchway from an upper story of the building and struck the ground near by him, and then, rebounding, struck him on the back and knocked him down. He was picked up by his fellow workmen, and complained of pain in his back where the hay struck him. He showed his back to one of them, Harrison Hayden, who testified that he saw a bruise there and rubbed it with liniment. Gardiner remained at the stable the remainder of the afternoon and wanted to go on with his work, but his comrades would not permit him to do so. After going home on Saturday evening he never returned to the stable, but after suffering for some days from acute nephritis, accompanied by violent convulsions, died on October 27th.

Dr. E. B. Iglehart, a physician and surgeon of nineteen years' practice and an instructor of surgery in the Johns Hopkins Medical School, testified that he, in company with Dr. Frank Smith, examined Gardiner after his accident and that he gave evidence of having received an injury. The Doctor said, in that connection, "I found a definite muscle spasm on the right of his back and some tenderness on pressure over his back on the left side." That to his mind the man's condition was entirely consistent with having been struck by a bale of hay. A hypothetical question was then put to the Doctor stating the circumstances of Gardiner's accident, sub-

sequent illness and death, and asking him to state, with those facts before him taken in conjunction with the facts discovered by him in his examination, what in his opinion caused the man's death. He replied, "I don't see how the accident can be ruled out as the factor of his death; I don't see how the accident could be ruled out." In response to further questions he said that a blow over the kidneys would cause acute nephritis with uræmic poisoning, which frequently produces death. Being asked on cross-examination whether he considered Gardiner's injury as the sole cause of his death, he replied, "I should have to give a certificate to that effect if I signed his death certificate, seeing him only once as I did. That is all I can say. I should have been compelled to fill out his certificate that the man died of traumatic nephritis, the result of a blow, as I had seen him only once."

Dr. Frank Smith fixed the date of the joint visit of Dr. Iglehart and himself to Gardiner as October 23rd, 1906, three days after the accident. He expressed views as to the nature and cause of Gardiner's illness and death similar to, but less positive than, those of Dr. Iglehart.

The record contains, as it always does in such cases, expert medical testimony of an opposite tenor introduced on behalf of the defendant. Several witnesses also testify that they saw the person of the assured after the accident and could see no bruises or other evidences of injury thereon, but the question of the weight of the evidence is one for the jury.

We find no reversible error in the action of the learned Judge below upon the prayers.

The plaintiff's prayer, which was evidently intended to refer to a recovery of a verdict for a death of the assured from accidental causes alone, does not affirmatively require the jury to find that his death was caused by the accident, independently of all other causes; but it does so in effect by requiring them to find that he died of acute nephritis caused by the accident, and also that he was at the time of the accident and until his death free from disease except the acute

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nephritis caused by the accident. It has been held in a number of cases that where the death is from a disease which was itself caused by the accident, the latter is to be regarded as the true and predominant cause of the death, and the disease as a mere link in the chain of causation, and the death is to be regarded as having resulted solely from the accident independently of all other causes. *Freeman v. Mercantile Accident Ins. Co.*, 156 Mass. 351; *Delaney v. Modern Accident Club*, 121 Iowa, 528; *Fetter v. Fidelity Co.*, 174 Mo. 256; *Horsfall v. Pac. Mut. Life Ins. Co.*, 37 Wash. 132; *Carey v. Preffd. Accident Ins. Co.*, 127 Wis. 67, 106 N. W. 1055; *Cent. Acci. Ins. Co. v. Rembe*, 220 Ill. 151, 5 L. R. A. N. S. 932; *Fidelity & Casualty Co. v. Johnson*, 30 L. R. A. 206, and cases collected in note thereto.

The defendant's first prayer was properly refused. The uncontradicted evidence showed the occurrence of the accident to Gardiner in the stable and his subsequent illness and death. The testimony of Drs. Iglehart and Smith was certainly legally sufficient to go to the jury upon the question of the causal connection between the accident and the death under the authority of the cases above cited by us, as well as the cases of *City Pass. Railway v. Kemp*, 61 Md. 74, and *P., B. & W. Ry. Co. v. Mitchell*, 107 Md. 600.

Nor was there any error in modifying the defendant's second prayer or in rejecting its third one, because both the third prayer and the second one in its original form totally disregarded the operation of clause (h), of the policy sued on, which made the company liable to the extent therein stated for injury, fatal or otherwise, to the assured due wholly or in part to disease or bodily infirmity.

Finding no error in the rulings of the Court below, we will affirm the judgment appealed from.

Judgment affirmed with costs.

PALATINE INSURANCE COMPANY *vs.* KATHERINE T. O'BRIEN—KATHERINE T. O'BRIEN *vs.* PALATINE INSURANCE COMPANY.

Insurance of Rents Against Loss by Fire—Construction of Policy—Delay in Rebuilding Caused by Obstructions in Streets—Effect of Plea of Tender and Payment into Court—Estoppel.

A policy insuring a landlord against loss of rents from the destruction of the demised property by fire, provided that the assured should rebuild in as short a time as the nature of the case would admit; that the loss should be computed from the time of the fire and cease upon the premises again becoming tenantable, and that in case the assured should elect not to rebuild, then the loss of rents should be determined by the time which would have been required for such other purpose. Also, that the company should not be liable for loss occasioned by ordinance or law regulating the construction or repair of buildings, or by interruption of business, manufacturing processes or otherwise. The buildings, whose rents were insured, were destroyed in a general conflagration, and delays in rebuilding were caused by the action of the municipal authorities in refusing permits to rebuild until certain street improvements were determined upon, and also on account of a delay occasioned by the condition of the streets in the vicinity, which were obstructed with the debris of other buildings. It was held upon former appeal that the insured could not recover for loss of rents during the time the rebuilding was prevented by the action of the municipality in refusing permits. *Held*, upon this appeal, that the assured is also not entitled to recover for loss of rents during the period of a delay in rebuilding caused by the obstruction of the neighboring streets as a result of the general conflagration.

In a suit on a policy insuring a landlord to a certain amount against loss of rents by fire, from the day of the fire until the

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time the building could be restored by the landlord by the exercise of reasonable diligence, the defendant company tendered by plea the amount of rent accruing for a certain period after the fire, alleged to be a reasonable time for rebuilding, and paid the same in Court. At the trial of the action, the defendant offered a prayer instructing the jury that the plaintiff could recover only nominal damages because there was no evidence of the amount of rents actually lost by the plaintiff on account of the destruction of the building. *Held*, that this prayer was properly refused, because under the policy the plaintiff was obliged to take immediate possession of the premises for the purpose of rebuilding, thus putting an end to the obligation of the tenant to pay rent, and it will be presumed, in the absence of evidence to the contrary, that such possession was taken; and also because, by its payment into Court, under its plea of tender, the company is precluded from alleging that the plaintiff had lost no rent.

When in an action on a contract—in this case on a fire insurance policy—the defendant files a plea of tender and pays into Court the sum of money tendered, he is estopped afterwards to allege that nothing was due to the plaintiff under the contract, and such tender operates as an admission that the amount paid into Court was due.

Decided December 2, 1908.

Appeal from the Superior Court of Baltimore City (ELLIOTT, J.)

Plaintiff's 1st Prayer.—That the proper measure of damages in this case is the actual loss of such rents, if any, from the property described in the evidence that they shall find the plaintiff has sustained, not exceeding the sum insured, from the date of the fire until such time as the premises could be restored or rebuilt as promptly as the nature of the case would admit; with interest on such rents after 60 days from the time proofs of loss were submitted to the defendant, if they so find such proofs of loss to have been submitted, provided the sum found shall be in excess of the amount paid into Court in this case, to wit, \$1,150.00. (Refused.)

Plaintiff's 2nd Prayer.—That the proper measure of damages in this case is the actual loss of such rents, if any, from the property described in the evidence that they shall find the plaintiff has sustained, not exceeding the sum insured, from the date of the fire until such time as the premises could be restored or rebuilt as promptly as the nature of the case would admit, with interest on such rents after 60 days from the time proofs of loss were submitted to the defendant, if they so find such proofs of loss to have been submitted; provided the sum found shall be in excess of the amount paid into Court in this case, to wit, \$1,150; but the refusal of the city authorities to allow the plaintiff to rebuild for a certain time, as set out in the evidence, if they find such refusal, is not a circumstance proper to be considered in arriving at such loss of rent. (*Refused.*)

Plaintiff's 3rd Prayer.—That there is no evidence in this case of any arbitration and award, and no consideration shall be given to the arbitration and award set aside and declared void by the United States Circuit Court. (*Conceded.*)

Plaintiff's 4th Prayer.—That if the jury find for the plaintiff in excess of the sum of \$1,150 paid into Court in this cause, they are to allow interest on the sum so found from sixty days after proofs of loss were submitted to the date of this trial, if they find such proof of loss to have been submitted. (*Refused.*)

Defendant's 1st Prayer.—That there has been offered in these actions no legally sufficient evidence of the amount, if any, of rents actually lost by the plaintiff by reason of the destruction by fire of the buildings mentioned in the evidence, and therefore, under the pleadings and the evidence in these actions, the plaintiff can only recover nominal damages. (*Refused.*)

Defendant's 2nd Prayer.—That the alleged action or non-action of the Baltimore City authorities with regard to establishing grades and building lines on German Street between Charles and Light Streets, and the alleged refusal of the Building Inspector to issue permits for the erection of build-

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ings at the place in question, are not, under the terms of the policies offered in evidence in these cases, to be considered by the jury in arriving at their verdict, and the delays, if any, that were caused by the same or any of them do not entitle the plaintiff to recover under the pleadings and evidence in these cases the amount, if any, of rents for the time covered by such delays. (*Granted.*)

Defendant's 3rd Prayer.—That under the terms of the policies offered in evidence the plaintiff is not entitled to recover for any loss or damage by fire, other than direct loss or damage by fire to the property in said policies described. And therefore under the pleadings and evidence in these cases, the plaintiff is not entitled to recover the amount of alleged rents of the plaintiff's premises in question for the time of alleged delays in rebuilding caused by other reasons than the destruction by fire of the buildings on her said premises, even though the jury shall find that such delays, if any, were due to the obstruction of the neighbouring streets, alleys and ground as a result of the destruction by fire of buildings and property belonging to persons other than plaintiff, and that the fire that destroyed such buildings on the property of others, as well as those of the plaintiff, was part of a general conflagration that swept over a large portion of the City of Baltimore. (*Granted.*)

The trial Court of its own motion gave the following instruction:

The jury are instructed if they find for the plaintiff in the two cases submitted to them, they may find for such an amount as would be the rent accruing for the time, if any, which they shall find would have been required to restore the premises to the condition in which they were at the time of the fire; but they are not to consider any loss of rent during the delay caused by the city, due to rebuilding in the burnt district, as shown by the evidence.

The cause was submitted to the Court on briefs by:

John J. Donaldson and *Daniel H. Hayne*, for the Palatine Insurance Company.

Hyland P. Stewart, for Katherine T. O'Brien.

PEARCE, J., delivered the opinion of the Court.

This is the second time these cases have been before this Court, being argued at the October Term, 1907, and decided January 8th, 1908, the opinion being reported in 107 Md. 341. They are two actions of assumpsit brought by Katherine T. O'Brien against The Palatine Insurance Company, an English corporation, upon two separate policies insuring certain rents issuing out of premises belonging to and leased by Mrs. O'Brien. The buildings upon these premises were destroyed by fire on February 7th, 1904, when a large part of the City of Baltimore was swept by the great conflagration of that date and the day following. The rents payable at the time of the fire by the lessees of these premises were \$230 per month from the property described in one of these policies, and \$85 per month from that described in the other policy, and the policies were identical in their terms and provisions, except that in the first policy mentioned above, the risk was limited to \$1,800, and in the last mentioned to \$1,040. The plaintiff claimed to recover under each the full amount insured. The defendant pleaded the two general issue pleas in assumpsit, and two special pleas, one of which set up an arbitration and award, but this award was declared void by a decree of the Circuit Court of the United States for the District of Maryland, and the defendant Insurance Company was enjoined from setting it up in any action on these policies. In the former appeal, a prayer granted by the lower Court taking from the jury the consideration of this award was held to be properly granted, and that question is not involved in this appeal.

In the other special plea, in the first case, the defendant alleged, "that since the date of said award, it has always been, and now is, and so tenders itself, ready and willing to pay

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said plaintiff such sum as, but for the destruction of said building by fire, would have been payable to said plaintiff by her tenants of said building; that the amount of said rents so as aforesaid for the period of three months (that being the period by the award determined to be a reasonable time for rebuilding) and for the months of February and March was, and is, the sum of \$1,150, which, together with legal interest thereon from the date of each instalment of rent to the day of filing these pleas and the plaintiff's costs accrued to said last-mentioned date, now tenders to the plaintiff, and pays here into Court in full satisfaction and discharge of plaintiff's alleged cause of action."

There was a similar plea in the second case, except that the sum paid into Court thereunder was \$425.00, and in each case the plaintiff replied to the plea mentioned, that the sum paid into Court was not sufficient to satisfy her claim in respect of the matters to which the plea was pleaded, and issue was joined on this replication.

Those trials resulted in a verdict for plaintiff, in one case of \$2,088, and in the other for \$1,206.40, and from the judgments entered thereon the former appeals were taken. There was only one exception in each appeal to the ruling on the prayers, and both judgments were reversed on appeal.

These policies contained the following provisions:

"The assured agrees to rebuild in as short a time as the nature of the case will admit. Loss to be computed from the time of the fire and to cease upon the premises again becoming tenantable. And in case the assured shall elect not to rebuild or repair, then the loss of rents shall be determined by the time which would have been required for such other purposes." * * * "But there can be no abandonment to this Company."

"This company shall not be liable beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise."

The plaintiff did not rebuild the same character of buildings as were destroyed by the fire. These were distinct buildings, described in the respective policies. In rebuilding she erected one building covering the site of the two previous buildings.

After the fire of February 7th and 8th, certain ordinances were passed for the improvement of the City in the burnt district. The lines of the streets and of the property holders were obliterated by the great fire. Surveys were necessary to re-establish these lines, and new grades of the streets were authorized and directed. Until these matters were determined, building permits could not be obtained, and the plaintiff, with alleged due diligence, did not, and could not, obtain her permit to rebuild until December 20th, 1904. The main question involved in the former appeal was whether the delay in obtaining this permit prevented the plaintiff's recovery for the period covered by that delay. The lower Court held that delay was a circumstance proper to be considered by the jury in determining the loss of rent, but this Court, on appeal, held that loss of rent occasioned by the action of the City authorities in delaying rebuilding was forbidden by the clause of the policy we have transcribed, and we cannot hesitate to reaffirm this.

Upon the second trial of these two cases, verdicts were rendered in each case for the exact amount paid into Court in each case, and from the judgments entered on these verdicts both parties have appealed, so that there are four appeals embraced in the record, and, as on the former appeals, the only exception in each case is to the ruling on the prayers. At these second trials no witnesses were examined, but by agreement the stenographer's notes of the first trial were read to the jury, and all the exhibits offered in evidence at the first trial were again offered and admitted. The bill of exceptions in the present appeals is identical with that in the former appeals, word for word, and it covers thirty-five pages of the record in the present appeals. These thirty-five pages might, and

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should have, been saved by agreement to refer for them to the former record. Counsel for Mrs. O'Brien, in his brief, states that this was inserted "at the request of the Insurance Company, and against the protest of the plaintiff below," and this statement was not contradicted in the brief for the Insurance Company.

JUDGE BURKE's opinion in the former appeals very clearly disposed of all the questions sought to be raised in the present appeals, except two, namely, first, the effect of the payment into Court by the defendant, and, second, whether the plaintiff could recover for loss of rents accruing during delay in building caused by the obstruction of the streets in the burnt district, apart from the inability to procure a permit to build. These questions will be considered in their reverse order. It was expressly and explicitly decided in the former case, that the loss of rent occasioned by the action of the City authorities in delaying the rebuilding of the premises could not be recovered under these policies. Counsel for Mrs. O'Brien, however, contend that there is a distinction between delays caused by the City in withholding permits to build, and the delays caused by general conditions of the streets being blocked by the debris of the fire throughout the whole burnt district, and this question is raised by the plaintiff's 1st and 2nd prayers and the defendant's 3rd prayer, these prayers of the plaintiff being refused, and the defendant's 3rd prayer being granted. These prayers, with the other granted and refused prayers will be set out by the Reporter.

Referring to the policies of insurance, it will be seen that they provide that "the assured agrees to rebuild in as short a time as the nature of the case will admit," and it is upon that language that the plaintiff's 1st and 2nd prayers are predicated. If this were all, the plaintiff's contention might be sustained. But the policies also, after providing that the Company shall not be liable for loss caused directly or indirectly by order of any civil authority * * * nor for loss occasioned by ordinance or law regulating construction or

repair of buildings, *also provides that it shall not be liable for loss occasioned "by interruption of business, manufacturing processes or otherwise."* The fall of debris in the streets was what occasioned "the interruption of business" in this case, so far as it affected building operations, and this cause of delay is as clear a bar to recovery as was the ordinance delaying the granting of permits to rebuild. We therefore must hold that the plaintiff's 1st and 2nd prayers were properly refused, and the defendant's 3rd prayer properly granted in each of the cases.

The defendant's second prayer was correctly granted and the plaintiff's third prayer was conceded and these require no further notice.

The defendant's first prayer raises the important question in this case, and goes to the right of recovery. It asserts that no legally sufficient evidence of the amount, if any, of rents actually lost by the plaintiff by reason of the fire, has been offered, and therefore, under the pleadings and evidence, the plaintiff can only recover nominal damages. This prayer was correctly refused for two reasons:

1st. Because in considering the Insurance Company's first prayer in the former appeal, which asserted the same legal principle as the defendant's first prayer in this appeal, it was held that Mrs. O'Brien was obliged under the terms of her two policies to take *immediate* possession of the property for the purpose of rebuilding or repairing; that there was no evidence she did not do so; and that in the absence of such evidence, the presumption is she discharged that obligation, and further that there was no evidence to rebut this presumption.

2nd. Because, by paying into Court the two sums paid in under the two policies in these cases, the defendant has precluded itself from saying that no rent is due under said policies.

The leading case upon this question is *Cox v. Parry*, 1 Term Rep. 464, decided in 1786. That was an action upon a policy of insurance, and the pleas were the general issue,

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and payment of money into Court. The policy was made in the name of DeSimons, but the suit was by Cox, as executor of Shultz, who was the owner of some of the articles insured, and it was alleged that it was directed and intended by all parties, that the policy should be so framed as to secure both DeSimons and Shultz. The Court said:

"The great question is whether the defendant has not, by paying money into Court, precluded himself from making the objection that, under the Statute 25 Geo. 3, the policy could not be applied to any goods except those of DeSimons. Therefore it will be necessary to see what effect paying money into Court has in the cause. It admits that the plaintiffs have a right to maintain the action, and reduces the question simply to the question of damages which they are entitled to recover. * * * As the defendant has paid money into Court, he has thereby admitted that the plaintiffs are entitled to maintain the action on their policy *to the amount of that sum*. But he has admitted nothing more. He does not, by paying money into Court, vary the construction and import of the policy, *so as to entitle the plaintiffs to recover beyond that extent*."

This case was approved in *Watkins v. Towers*, 2 Term Rep. 275, where payment of money into Court was held to dispense with proof of execution of deed on which the suit was brought.

It was again approved in *Gutteridge v. Smith*, 2 Henry Bl. 374, decided in 1794. The action was on a bill of exchange by the payee against the drawer, and payment into Court was pleaded. There was a non-suit because the plaintiff was not prepared to prove the drawer's signature, but under a rule to show cause why the non-suit should not be set aside, the rule was made absolute. LORD CHIEF JUSTICE EYRE said: "Payment into Court of 5£ on a 20£ note would have same effect as payment of that amount before suit brought and would afford a just inference of the existence of the debt." And in the same case JUSTICE ROOKE said, that "on a policy

where the plaintiff goes for a total loss, while it admits the policy itself, yet it does not admit that defendant is liable for more than the amount paid in."

In *Jenkins v. Tucker*, 1 Henry Bl. 90, the question was whether defendant could demur after payment of money into Court, and LORD LOUGHBOROUGH went so far as to say: "This demurrer strikes me as being extremely absurd, since by payment of money into Court the defendant admits a cause of action."

In *Bennett v. Francis*, 2 Bos. & Pul. 550, the earlier cases were reviewed by LORD CHIEF JUSTICE ALVANLEY at length, and the doctrine established by them was maintained.

The American cases are to the same effect.

In *Enc. Pl. & Pr.*, Vol. 21, p. 584, it said that where the plea of tender is treated as an admission that the amount tendered is due, the adverse party is entitled to recover that amount, *without proof on his part*. But a plea of tender of a sum smaller than that claimed by plaintiff does not preclude resisting demand for a greater sum, or from making any defense consistent with the admission of the cause of action."

In *Wood v. Parry*, 1 Barbour, 129, the Court said: "Whenever tender is made and insisted on in the pleadings, the creditor is at least entitled to that amount. The rule is founded in good sense. Where the debtor admits a certain amount to be due, it is not a point at issue between the parties, and the creditor is not required to establish it by proof."

In *Eaton v. Wells*, 82 N. Y. 576, there was a tender of \$2,568, which was a few cents less than the amount due that day on the mortgage, and CHIEF JUDGE FOLGER said: "There was no issue of fact for trial. The pleadings contain the facts."

In *Foster v. Napier*, 74 Ala. 393, the Court said: "Since a plea of tender admits that the amount tendered is due, the plaintiff is entitled to that amount *at all events, whatever may*

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be the result of the action; nor does his refusal to accept that sum, affect his right to recover that sum."

In harmony with the cases cited is the case of *McCullough v. Hellweg*, 66 Md. 276, in which this Court said: "In an action *ex contractu*, the defendant may tender the amount he believes to be due, and the tender *operates as an estoppel*, so that he cannot subsequently deny that the amount tendered is due."

The jury found for the plaintiff for the exact sum paid in each case, consequently it is unnecessary to consider the refusal of the plaintiff's fourth prayer in each case, which asked that interest be allowed on the amount found, after sixty days from submission of proofs of loss—if the sum found should exceed the amount paid in. For the reasons stated the judgment appealed from in each case will be affirmed. The costs below were properly taxed against the plaintiff under Sec. 21 of Art. 75 of the Code, but the costs of these appeals should be paid by the defendant.

Judgment affirmed, costs below to be paid by Katherine T. O'Brien; costs on appeals to be paid by the Palatine Insurance Company.

WILLIAM H. STINSON vs. THE ELLICOTT CITY
AND CLARKSVILLE COMPANY.

Appeal from Order Overruling Demurrer to Bill Without Payment of Costs—Bill for Injunction Against Interference with Land Not Showing Nature of Plaintiff's Interest in the Land—Demurrer.

A defendant may appeal from an order overruling his demurrer to a bill of complaint, although it does not affirmatively ap-

pear that he has paid the ten dollars and costs, in compliance with Code, Art. 16, Sec. 154, which provides that a party whose demurrer is overruled shall pay to the opposite party the sum of ten dollars and costs.

A bill of complaint by a turnpike company alleged that they had obtained by grant from one C., now deceased, then the owner of land now owned by the defendant, the right to construct its road on his land, and that the defendant had built a fence on the road which lessened its width, and was about to build another fence. The bill prayed for an injunction, and for the removal of the fence already erected, and for general relief. No deed or other exhibit was filed therewith. *Held*, that a demurrer to the bill should be sustained since it fails to show how the plaintiff company acquired its rights in the land, or what the extent of such rights were, or whether the alleged grant from the former owner of the land was binding on the defendant.

Decided December 4, 1908.

Appeal from the Circuit Court for Howard County (FORSYTHE, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and WORTHINGTON, JJ.

Edward M. Hammond, for the appellant.

James Clark and Joseph L. Donovan, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

This is an appeal from an order overruling a demurrer to a bill of complaint, filled by the appellee against the appellant. The bill alleges that the plaintiff under its charter constructed a turnpike road leading from Ellicott City to Clarksville, in Howard County, "and that by virtue of a grant from the late John R. Clarke, who was then the owner of the property hereinafter referred to and which is now

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owned by William H. Stinson as hereinafter referred to, your complainant was granted the right to go upon the property and build through and upon said property the pike hereinbefore referred to, and that they have exercised the said right and privilege for the past thirty years or more." It then alleges that while the roadway was in peaceful possession of the complainant, and it was enjoying the privileges granted by its charter "and by the grant from the said John R. Clarke," the defendant, who owned and resided upon the farm binding upon said turnpike, without the consent of the plaintiff, and against its protest, with his servants and employees entered upon the turnpike and dug a large number of holes in it, placed posts in said holes from four to five feet in height and built a fence commonly called a "post and rail fence," and is about to build more fence of a like character upon the pike. It further charges that the fence will greatly lessen the width of the pike, will endanger lives and property of persons having occasion to use it, will prevent the cleaning of the drains and ditches in connection with the pike and will subject the complainant to great loss and injury. It also charges that the fence is so constructed that the Citizens Telephone Company has been compelled to place its poles outside of the fence and in the roadway, which greatly adds to the danger of all persons using the pike, but it does not state how that company acquired the right to so place its poles. The bill prays for a writ of injunction, enjoining and prohibiting the defendant from digging holes in and upon the pike, and planting posts therein, from constructing the fence and commanding him to remove the fencing already constructed by him on the pike. There is also a prayer for general relief. A copy of the charter of the plaintiff was filed with the bill, but no deed or other exhibit.

A motion to dismiss the appeal was made on the ground that the appellant had not paid the ten dollars and costs referred to in Section 154 of Article 16 of the Code. That section provides that the party whose demurrer is overruled or withdrawn, without leave of Court, "shall pay to the op-

posite party the sum of ten dollars, and the costs thereof, and be in contempt until the said sum of money and costs are fully paid, unless the Court shall otherwise specially order.” The appellee relied on *Gilbert v. Arnold*, 30 Md. 29, to sustain its motion. In that case the Court had announced its determination to overrule a demurrer which had been filed, and to grant an injunction prayed for, and had prepared an order to that effect which was not filed at the time “at the request of and in courtesy to the solicitors for the defendants,” who desired time to examine into their right to withdraw the demurrer and file their answer, after the opinion had been announced and the order signed. They then, without leave of the Court, filed an order with the Clerk withdrawing the demurrer and filed their answer. On the same day the order of the court overruling the demurrer and granting the injunction was placed on file. This Court held that as the defendants were in contempt, for the non-payment of the fine and costs, they had no right to file their answer and the Court below was justified in acting upon the bill and exhibits without considering the answer, but as it appeared that the fine and costs were paid before the appeal was taken, the answer would be considered “in so far as to entitle the defendants to the right of appeal from the order granting the writ of injunction.” That had reference to the statute, now Section 27 of Article 5 of the Code, which required the answer of the party appealing from an order granting an injunction to be first filed. It is manifest that that decision does not sustain the motion to dismiss this appeal. The question involved was the right to file an answer, without leave of the Court, after withdrawing a demurrer without first obtaining leave to do so. Such action of the defendants put them in contempt by the terms of the statute, and they had no right to file their answer without obtaining leave of the Court—at least until they purged themselves of the contempt by paying the ten dollars and costs. No such question could have arisen in this case as the Court below expressly granted leave for the defendant to file an answer, and, unless

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it was satisfied that the demurrer was intended for vexation and delay, the Court was directed by Section 153 of Article 16 to require the defendant to file an answer.

But beyond all that, the very question involved in this appeal is whether the Court below rightfully overruled the demurrer—the result of which action, if sustained, not only required the defendant to answer, but subjected it to the payment of the fine and costs. That a defendant may appeal from an order overruling a demurrer to a bill of complaint is settled by *Chappell v. Funk*, 57 Md. 465, *Hyattsville v. Smith*, 105 Md. 321, and other cases in this State, and it has never been thought necessary for this Court to inquire whether the ten dollars and costs were paid before entertaining the appeal, which would be proper, if not necessary, if the right of appeal depended upon the payment of them. Such a rule would require a defendant to do, in part, what he is asking this Court to determine whether the Court below rightfully required him to do. The motion to dismiss seems to assume that if a bond had been given to stay the operation of the order the motion could not have prevailed, as it alleges that no such bond had been given, but a bond is only given to stay the operation of an order or decree, and the question whether the ten dollars and costs can be collected, pending this appeal, is not involved in this case but merely whether the appeal will lie. As we have no doubt as to the latter, the motion to dismiss the appeal will be overruled, without relying on the fact that there is nothing in this record to show that the fine and costs have not been paid.

Without deeming it necessary to enter into a discussion of the question as to how a right of way can be acquired by such a corporation as the appellee, or whether a grant must be in writing and executed as provided by Article 21 of the Code, as the appellant has done in his brief, it would seem to be clear that we must either construe the language of the bill to mean that the grant was acquired by deed or some instrument in writing, or we must hold that the bill failed to inform the Court how it was acquired. It certainly does

not give any definite information as to *what* was acquired, for it might be, so far as the bill discloses, either a narrow or a wide strip of land, and in either event some part of the land that was not in fact acquired. As is said in *Miller's Eq. Proc.* 687: "The general rule that every bill in equity must contain a clear statement of the facts upon which the plaintiff relies for relief is applied with much rigor to a bill for an injunction," and it was impossible for the defendant to ascertain from this bill what the plaintiff's rights in the property were, or were claimed to be. If we assume that it meant to allege that the plaintiff claimed under a deed or other writing from John R. Clarke, then a copy, or the original, should have been filed, or some sufficient reason for its non-production given. *Hankey v. Abrahams*, 28 Md. 588; *Miller v. Balto. Co. Marble Company*, 52 Md. 642; *Balto. v. Coates*, 85 Md. 531. That such omission is ground for demurrer is decided in *Miller v. Marble Co.*, *supra*, where it is said that the defect is not waived by the demurrer, for it "admits only the truth of the facts stated in the bill, so far as they are relevant and well pleaded."

If, on the other hand, the plaintiff does not rely on a deed or a contract in writing, the bill should state how it did acquire the rights sought to be protected, and what they were, for even if it be true that the plaintiff had acquired a right of way over this land from Clarke, there may still be some question whether it so acquired it as to be binding on the defendant, or whether it acquired such a width as to authorize a Court of equity to grant an injunction against the defendant from constructing the fence complained of or compelling him to remove that already constructed. When a party seeks the aid of a Court, by writ of injunction, his right to it ought not to be left in doubt by the allegations of the bill, and the defendant ought not to be required to guess what the plaintiff does rely on. The bill should be more specific on that important subject than this one is.

As under the allegations of the bill no relief could be

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granted other than that of an injunction, if the defect above pointed out did not exist, the prayer for general relief can be of no avail, and for the reasons we have given the demurrer ought to have been sustained. We will remand the case so that the lower Court can grant leave to amend the bill, if desired by the plaintiff.

Order reversed and cause remanded, the appellee to pay the costs above and below.

WILLIAM H. BENTON *vs.* NELLIE E. STOKES.

Landlord and Tenant—Notice to Quit and Petition for Restitution Need Not Be Signed by Landlord in Person—Authority of Agent to Give Notice to Tenant—Appeal.

Code, Art. 53, Sec. 1, provides that when a landlord shall desire to re-possess the demised premises after the expiration of the lease, and shall give notice in writing one month before the expiration of the term to the tenant to remove from the premises at the end of the term, if the tenant shall refuse to comply therewith, then the lessor may make complaint thereof in writing to a Justice of the Peace, who may order restitution and summons, etc. In this case, the notice to quit served on the tenant was signed by the agent of the landlord, who had leased the premises to the tenant, and the petition to the Justice of the Peace for a summons and order of restitution was signed by a lawyer as attorney for the landlord. *Held*, that the statute does not require either of these instruments to be signed by the landlord in person; that the notice to quit and the petition for the order of restitution were both sufficient, and that the Justice of the Peace had jurisdiction of the proceedings.

A notice to quit given by a landlord to a tenant is sufficient if it be so certain that the tenant cannot reasonably misunderstand it. An obvious mistake in some part does not invalidate the notice.

When an agent has authority to rent certain premises for the owner it will be presumed that he is authorized to give the tenant notice to quit.

When a Justice of the Peace has jurisdiction of the proceedings instituted by a landlord to recover the demised premises, no appeal lies to the Court of Appeals from the action of the Circuit Court on appeal from the Justice to that Court.

Decided December 9th, 1908.

Appeal from the Circuit Court for Prince George's County.

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and WORTHINGTON, JJ.

T. Van Clagett, for the appellant, submitted the cause on his brief.

C. B. Calvert (with whom were *Hill, Rogers & Mattingly* on the brief), for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

This is an appeal from a judgment of the Circuit Court for Prince George's County which affirmed upon appeal the decision of a Justice of the Peace awarding restitution of certain demised premises to the appellee as landlord. The proceeding before the Justice had been taken, by the appellee against the appellant as her tenant, under the provisions of Article 53 of the Code relating to tenants holding over.

At the trial of the case in the Circuit Court the appellant moved to quash the proceedings for want of jurisdiction in the Justice of the Peace to entertain them but the Court overruled the motion and affirmed the judgment. The appel-

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lant then appealed from the order overruling the motion to quash and from the judgment of affirmance.

The vital question presented for our determination by the record is whether the justice had jurisdiction of the proceeding instituted before him for if he had it is settled by numerous decisions of this Court that no appeal lies to us from the action of the Circuit Court upon the appeal from the justice to that tribunal. *Cole v. Hynes*, 46 Md. 184; *Herzberg v. Adams*, 39 Md. 312; *Mears v. Remare*, 33 Md. 250; *Darrell v. Biscoe*, 94 Md. 684; *Hopkins v. P. W. & B. R. R. Co.*, 94 Md. 257; *Roth v. State*, 89 Md. 524.

The material facts appearing from the record are as follows:

On July 12th, 1906, a written lease under seal for the demised premises, consisting of an improved lot of land in Hyattsville, was made between the parties to this appeal for the term of one year, to begin on July 30th, 1906, at the rent therein stipulated payable in monthly instalments, with a provision that the lease was to continue in force from term to term with the right to either party to terminate it at the end of any term "by giving at least sixty days previous notice thereof in writing." This lease recited on its face that it was made "between Rogers & Farden, Agents for Nellie E. Stokes, landlord, and Wm. H. Benton, tenant."

On May 20th, 1907, Rogers & Farden, as agents of the appellee served on the appellant a notice to quit the premises at the end of the year on July 30th midnight. This notice was in the usual form and was signed "Rogers & Farden, Agents for Nellie E. Stokes."

On September 19th, 1907, the appellant filed with Arthur Carr, a Justice of the Peace for Prince George's County, her petition alleging her ownership of the demised premises, their occupancy by the appellant as her tenant for a term which expired at midnight on July 31st, 1907, the service upon him of the notice to quit and his refusal to give up the premises. The petition concluded with a prayer for a summons against the appellant requiring him to show cause why restitution of

the premises should not be made to the petitioner. This petition although in the name of the appellee, "Nellie E. Stokes," was not signed by her but by "James C. Rogers, attorney for Nellie E. Stokes." Upon the filing of the petition summons was issued as prayed for against the appellant and he, failing to appear in response thereto, the case was adjourned for one week and then after "trial had" before the justice, the judgment for the restitution was rendered, from which the appeal to the Circuit Court was taken.

No objection is made by the appellant to the contents of the notice to quit or the petition to the justice. The two grounds, stated by him in his motion to quash the proceedings in the Circuit Court and relied on in his brief in this Court, for denying the jurisdiction of the Justice of the Peace to entertain the appellee's petition, are that neither the notice to quit nor the petition to the Justice were signed by the appellee herself and that therefore they failed to so comply with the provisions of Article 53 of the Code as to give the Justice jurisdiction.

We do not regard either one of these grounds of objection as sound. Section 1 of Article 53 of the Code provides both for giving the notice to quit and filing the petition to the Justice of the Peace. Its language is: "In all cases where any interest in real estate shall be let or leased for any definite term or at will and the lessor, his heirs, executors, administrators or assigns shall desire to repossess the same after the expiration of the term for which it was demised and shall give notice in writing one month before the expiration of said term or determination, of said will, to the tenant or the person actually in possession of the premises to remove from the same at the end of said term, and if the said tenant or person in actual possession shall refuse to comply therewith the lessor, his heirs, executors, administrators or assigns may make complaint thereof in writing to any Justice of the Peace of the county wherein such real estate is situate."

It is to be observed that this section merely authorizes the lessor to "give notice in writing" to the tenant at the time

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therein mentioned and, in the event of the refusal of the tenant to comply therewith, "to make complaint thereof in writing" to the Justice without specifying the form of the notice or the method of its service or indicating the style or details of the complaint to be made to the Justice, other than to require both to be in writing. It does not in terms require either instrument to be signed by the landlord in person. Under these circumstances it must be presumed that the Legislature intended that the notice to the tenant must be such as to clearly inform him by whom or on whose behalf it was sent, to what property it related and of what facts it was intended to inform him.

In *Cook v. Creswell*, 44 Md. 581, it was contended that a landlord's notice to quit, almost identical in terms with the one now before us, was bad because it was addressed to and served upon the tenant's husband instead of the tenant herself, but our predecessors held it to be good, saying in that connection: "A notice to quit will be held good if upon the whole it is intelligible and so certain that the tenant cannot reasonably misunderstand it. An obvious mistake in some part will not invalidate it, if it is otherwise so explicit that the party receiving it cannot be misled. * * * " In *Clark v. Keliher*, 107 Mass. 406, the notice was addressed to John Clark whose full name was Thomas B. Clark. Ames, J., in considering this mistake uses the following language: "The notice to quit was sufficient and lawful both in substance and the mode of service. There was no uncertainty as to the party from whom it emanated or the tenement to which it applied and there could have been no doubt that it was intended for the family who occupied that tenement." Upon the principles thus announced there can be no doubt of the sufficiency of the notice now under consideration.

The appellant having signed and sealed the lease of July 12th, 1906, and gone into possession of and occupied the demised premises under and by virtue of that lease is estopped from denying the truth of the recital contained on its face that Rogers and Farden were the agents of the appellee to

rent the property. A landlord's agent having authority to rent a property is presumed to have like authority to give to the tenant a notice to quit. 24 Cyc. 1331; *McClung v. McPherson*, 47 Oregon, 73; 81 Pac. R. 567. Furthermore the appellee as landlord subsequently ratified the act of her agent in making the lease and giving the notice to quit by declaring in her petition to the Justice of the Peace that she had made both of them.

It is equally clear that the signing of the petition to the Justice by the counsel of the appellee was both appropriate and sufficient. It professed on its face to be her petition and the prayer for relief was on her behalf. It was said in the opinion of this Court in *Weikel v. Cate*, 58 Md. 105, that the office of Justice of the Peace has never been considered a Court of law because a Court of law within the meaning of the Constitution is a Court of record, yet that office is almost as old as the common law itself. Originally Justices of the Peace were merely conservators of the Peace but at an early day in England they were invested by statute with limited judicial powers in both civil and criminal matters. They are classed among judicial officers by the Constitution which provides for their appointment and declares that their jurisdiction shall be the same which they theretofore exercised or should thereafter be prescribed by law. A litigant is not required to conduct proceedings before them by counsel but it has long been a recognized method of practice to do so, and we think that the filing of her petition by the appellee over the signature of her counsel in the present case constituted a compliance with the requirements of Article 53 of the Code in that connection.

As the Justice of the Peace before whom the present proceedings were instituted had jurisdiction to entertain them the judgment of the Circuit Court affirming his decision was final and no appeal lies therefrom to this Court, and the present appeal must be dismissed.

Appeal dismissed with costs.

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Syllabus.

GEORGE A. SHOCKLEY vs. PENNSYLVANIA RAIL-
ROAD COMPANY.*Carriers—Delay in Transportation—Liability of Intermediate
Connecting Carrier—Evidence—Appeal.*

In an action against an intermediate carrier to recover damages for its delay in the transportation of freight, a memorandum showing the time of the arrival of the cars carrying the freight at certain points, which memorandum is a copy and not the original record, is not admissible in evidence.

When freight is to be transported over two or more connecting roads, each road is liable only for failure to carry safely and promptly over its own line, when there is no agreement imposing upon a road extra-terminal liability for delay.

Plaintiff shipped fruit to Boston from a place in Maryland. The shipments passed over three connecting roads before being delivered to the defendant company in Philadelphia, by which they were carried thence to Jersey City, and there delivered to another carrier for final transportation. In an action against the defendant, this intermediate connecting carrier, to recover damages for its delay in the transportation of the fruit, which resulted in its being delivered in Boston in a damaged condition and too late for the market on the day for which it was designed, the evidence showed that the fruit was delivered in good condition to the initial carrier at a certain time, but there was no evidence as to the time when the cars in which the fruit was loaded left the starting point, or as to when they were delivered to the next carrier or to the defendant, or as to what was a reasonable time for transportation over the several roads. *Held*, that since the burden of proof was upon the plaintiff to show that the delay complained of occurred on the defendant's road, and there is no evidence to show when defendant received the fruit or when it was delivered to the next carrier, the jury was properly in-

structed that there was no legally sufficient evidence to entitle plaintiff to recover.

The error of the trial Court in excluding competent evidence of a certain fact cannot be complained of on appeal when that fact was subsequently proved in the case by other witnesses, and the appellant does not appear to have been injured by such exclusion of evidence.

Decided December 2nd, 1908.

Appeal from the Circuit Court for Somerset County (LLOYD and HOLLAND, JJ.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

James E. Ellegood and F. Leonard Wailes (with whom was *Henry B. Freeny* on the brief), for the appellant.

John R. Pattison, for the appellee.

BRISCOE, J., delivered the opinion of the Court.

On the 27th day of December, 1904, the appellant brought this suit in the Circuit Court for Wicomico County against the appellee, the Pennsylvania Railroad Company, a corporation incorporated under the laws of the State of Pennsylvania, but exercising franchises as a common carrier in the State of Maryland.

On the 23rd day of March, 1908, upon suggestion of the appellee, the case was removed to the Circuit Court for Somerset County for trial, and from a judgment in favor of the defendant for costs the plaintiff has appealed.

It appears from the record there were three exceptions taken by the plaintiff to the rulings of the Court in the course of the trial of the case, and these form the basis of this appeal. Two of these were to the admission of testimony, and the third to the granting of the defendant's

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prayer at the conclusion of the plaintiff's case, which instructed the jury that upon the pleading and evidence in the case there was no legally sufficient evidence to entitle the plaintiff to recover.

The questions presented by these exceptions will now be considered by us in their regular order.

The suit was instituted, as stated by the bill of particulars filed by the plaintiff, for the purpose of recovering damages for the loss of strawberries shipped from Pittsville, Wicomico County, Maryland, to Seaverns & Co., Commission Merchants, at Boston, Mass., from May 6, 1903, to June 1, 1903, over and by way of the connecting lines and railroad of the defendant, and not transported and delivered with due dispatch by the defendant.

The strawberries were delivered and received on the days stated by the Baltimore, Chesapeake and Atlantic Railway Company, the initial carrier, at its station, Pittsville, Wicomico County, to be carried to their point of destination, Boston, Mass. They were consigned and way-billed over the following railroads: From Pittsville to Salisbury, a distance of ten miles, by the Baltimore, Chesapeake and Atlantic Railway; from Salisbury to Delmar, a distance of six miles, over the New York, Philadelphia and Norfolk Railroad; from Delmar to Philadelphia, a distance of one hundred and twenty miles, by the Delmar Division of the Philadelphia, Baltimore & Washington Railroad; from Philadelphia to Jersey City, a distance of ninety miles, over the defendant's road, an intermediate carrier, known as the New York Division of the Pennsylvania Railroad, and from the last-named point to Boston, over the New York, New Haven and Hartford Railroad, the terminal carrier.

The declaration in this case alleges that the defendant (an intermediate connecting carrier) did not transport the strawberries over its road with reasonable dispatch as it was in duty bound to do, and by reason of this failure on its part the strawberries reached their point of destination too

late for the market of the day for which they were shipped and were received in a damaged condition, whereby the plaintiff sustained a heavy loss.

The trial resulted in a verdict for the defendant, and the case being here upon the plaintiff's exceptions, we will now proceed to consider them.

The first exception relates to the rulings of the Court in excluding the testimony of the witness Davis as to the customary usage for the transportation and time of arrival of "the Boston train" for the early morning market for berries. It appears, however, that the witnesses Loring and Morrison, subsequently in the course of the trial, upon the offer of the plaintiff, testified as to the time of the arrival of the strawberry trains, so the plaintiff had full benefit of the excluded evidence of the witness Davis, and could not have been injured by this ruling, assuming the Court below committed an error in so ruling.

The second exception was taken to the ruling of the Court in refusing to permit the counsel for the plaintiff to read to the jury, in connection with the depositions of the witness Tomlinson, taken in Jersey City, N. J., on the 27th of February, 1908, under a commission, before a Notary Public of the State of New Jersey, a tabulated statement called "Boston Cars," under the column headed "Passed Gray's Ferry" and under the column arrived "J. City," for the purpose of showing the time that the cars arrived at and passed Gray's Ferry at Philadelphia and their arrival at Jersey City.

It appears, upon the taking of the depositions of the witness Tomlinson, in Jersey City (which were read to the jury without objection), the witness had a memorandum headed "Boston Cars," with the first or left-hand column headed "Car Initial Number," and the right-hand column headed "Time Floated," and the witness here testified that the initials and car numbers noted in the column headed "Car Initial Number," and the figures at the right-hand column un-

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der the words "Time Floated" are the car numbers and the times that the said cars were delivered to the floats of the New York, New Haven and Hartford Railroad. Thereupon the following agreement was had by the counsel for the parties as to the use of the memorandum at the trial of the case: "It is stipulated and agreed between the plaintiff and defendant that the plaintiff may offer in evidence at the trial of this cause the first or left-hand column headed 'Car Initial Number,' and the right-hand column headed 'Time Floated,' and that the offer will not be objected to on the ground that the same is not the original or primary evidence and shall have the same effect as if the same were so offered as the primary proof; and that the defendant may offer at the trial of the cause any other data appearing upon the memorandum consisting of two sheets and marked 'Boston Consignments,' and no objection to such offer will be made on the ground that the memorandum is not primary evidence. The plaintiff and defendant reserving objections as to the materiality of the said testimony."

It will be thus seen that the copy of the memorandum offered to be read, called the tabulated statement of "Boston Cars," that is the columns headed "Passed Gray's Ferry" and "Arrived J. City," was not included in the stipulation between the parties, to be used as evidence by the plaintiff at the trial of the case, and not being the original record was properly rejected by the Court. The plaintiff had the benefit of the depositions of the witness, both his examination in chief and on cross-examination, and the defendant was not required to offer its evidence until the close of the plaintiff's case. We find no reversible error in the ruling of the Court embraced in this exception.

The principal question, however, on the appeal arises under the third exception, and that is whether the Court committed an error in granting the defendant's prayer which withdrew the case from the jury.

According to the evidence, the defendant company was

an intermediate connecting carrier, its road beginning at Gray's Ferry, Philadelphia, and ending at Jersey City, New Jersey. Freight shipped from Pittsville to Boston would have to pass over the roads of three other companies, the Baltimore, Chesapeake and Atlantic Railway Company from Pittsville to Salisbury; the New York, Philadelphia and Norfolk from Salisbury to Delmar; and the Philadelphia, Baltimore and Washington to Gray's Ferry, before reaching the defendant's road, and then, before reaching Boston, the point of destination, would have to pass over the New York, New Haven and Hartford Railroad, the delivering carrier.

The grievance complained of by the plaintiff and the substantial cause of the action was the negligence of the defendant company, a connecting carrier, to deliver with reasonable dispatch or on time, the freight mentioned in the declaration, and in consequence of this failure they did not reach the point of destination in time for the market of the day for which they were shipped.

Under the facts of the case now before us, there were five different railroads over which the freight in question had to be carried from Pittsville, Md., the initial point, to Boston, Mass., the point of destination, and the liability of the defendant company, as one of the intermediate connecting carriers was confined to the limits of its own road. In other words, it was in duty bound to safely carry with reasonable dispatch over its own road and to safely and promptly deliver, without unnecessary delay and detention to the next connecting carrier.

The law in this regard has been settled in this State by numerous decisions and by the Supreme Court of the United States. *P., W. B. R. R. Co. v. Lehman*, 56 Md. 233; *Hoffman v. Cumberland R. R. Co.*, 85 Md. 394; *B. & O. R. R. Co. v. Whitehill*, 104 Md. 314; *Orem Fruit Co. v. N. C. Ry. Co.*, 106 Md. 16.

In *Myrick v. R. R. Co.*, 107 U. S. 107, it was held: "Each road confining itself to its common law liability is only

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bound in the absence of a special contract to safely carry over its own route and safely to deliver to the next connecting carrier, but any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect such liability will not attach and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence." And in *Elliott on Railroads*, sec. 1435, it is said: "The majority of our Courts have held, in accordance with what is called the American rule, that the mere acceptance of goods directed to a point off the carrier's line is not a sufficient basis for the implication of a contract for extra terminal liability and that, in the absence of an express contract or of more significant facts or specification than the fact of acceptance as the basis of an implied contract, the initial carrier is discharged by carrying safely to the end of its line and there delivering to the next carrier."

There was no contract in this case for extra terminal liability, or any facts upon which such a contract could be based, so it is clear, the defendant company would be liable only for delays occurring on its own route, which could have been avoided by the exercise of reasonable diligence in delivering the freight to the next connecting carrier.

According to the evidence in the case, the freight was delivered to the initial carrier, the Baltimore, Chesapeake and Atlantic Railway, at its station at Pittsville, in good condition on the day it was to be shipped, and the cars were due to leave Pittsville at about 5.30 P. M., but there is no evidence whatever that the train left on time or the hour of the day at which the cars actually left the starting point. The witness Hickey, agent at Delmar of the New York, Philadelphia and Norfolk Railroad and of the Philadelphia, Baltimore and Washington Railroad, testified as to the time of the arrival of the cars at Delmar, a distance of only sixteen miles from Pittsville, and stated they arrived at different hours, from 8.30 P. M. to 12.52 P. M.

There is also an absence of evidence as to the time when the cars left Pittsville, Delmar, Salisbury and Gray's Ferry, or what would be a reasonable time to be consumed in the transportation of the freight over the several roads. There is no evidence whatever as to the time when the freight was received upon the defendant's road or when it was delivered to the next carrier, and it is therefore difficult to see upon what ground it can be asserted that the delay in the transportation of the freight was solely due to the defendant's negligence. The burden of proof was upon the plaintiff to show that the delay occurred upon the defendant's road and, failing in this, the Court below committed no error in granting the defendant's prayer, which instructed the jury that upon the pleading and evidence there was no legally sufficient evidence to entitle the plaintiff to recover. In this case, there was no evidence showing when or where the delay was in fact caused, and there being no presumption that it happened upon the line of the defendant company, an intermediate carrier, there could be no recovery against the defendant. There being no error in the rulings of the Court, the judgment will be affirmed.

Judgment affirmed, with costs.

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Syllabus.

CHARLES S. HOLLANDER ET AL. vs. THE CENTRAL
METAL AND SUPPLY COMPANY.

*Enforcement Against Non-Resident of Covenant of Redemption
in Lease—Notice by Publication—Who Is a Non-Resident—
Hearing of Case on Petition and Answer Without Evidence—
Deed to Be Made at Cost and Charge of Grantee—Counsel
Fees — Covenant of Redemption in Lease Runs with the
Land—Covenant Not in Violation of Rule Against Perpetui-
ties—Averments in Bill by Assignee of Leasehold to Redeem
Rent.*

The State has control over real property within its limits, and may provide by statute that the contractual obligations of a non-resident owner relating to such property may be enforced against him, after reasonable notice by publication, without personal service.

Specific performance of a covenant relating to the redemption of a ground rent may be decreed against a non-resident owner of the rent after notice by publication, and a trustee may be appointed to execute the conveyance of the rent, under Code, Art. 16, Sec. 117, which provides that when a defendant in a suit in chancery to enforce a contract, etc., relating to property, is a non-resident, notice of such suit may be given by publication in the manner therein prescribed, and a trustee appointed to execute any deed that may be required.

When the order of publication warning a non-resident owner of a suit instituted by the tenant to redeem a ground rent, in pursuance of a covenant in the lease, describes the property as being situated on a certain street, and the ground rent as one of a certain amount, created by lease of a certain date, executed by designated parties, and recorded in designated land records, there is a sufficient notice to the defendant of the subject-matter of the suit under Code, Art. 16, Sec. 177, which directs that published notice shall be given of the substance and object of the proceedings.

When a case is heard upon petition (or bill) and answer alone, without evidence, the averments in the answer are taken to be true, but only the petitioner (or the plaintiff) has the right to set the cause for hearing on petition and answer alone.

A former resident of this State who has been in Europe for a year and a half, and who is now in New York for certain purposes, may be proceeded against as a non-resident under Code, Art. 16, Sec. 117, although he has not acquired a fixed residence elsewhere, and intends to return to this State at some indefinite time in the future.

The assignee of an assignee of a leasehold interest is entitled to the benefit of covenants in the lease that run with the land, such as a covenant of redemption.

It is not necessary in a bill by the assignee to enforce such covenant of redemption that the *mesne* assignments from the original lessee to the plaintiff should be set forth.

When a lease provides that the lessor shall convey the fee simple to the lessee or his assigns at their request and cost and charge, the lessor cannot claim a counsel fee for the examination of the title of an assignee of the leasehold in order to ascertain if he is entitled to the benefit of the covenant.

A covenant in a lease by the lessor to convey the reversion upon the payment of a certain sum to the lessee, his heirs or assigns, is a covenant running with the land, and may be enforced by the assignee of the leasehold estate against an assignee of the reversion.

A covenant in a lease for ninety-nine years, renewable forever, that at any time during the continuance of the demise, the lessor, his heirs and assigns, will convey the fee simple title in the land to the lessee or his assigns, upon payment of a designated sum, is not in conflict with the Rule against Perpetuities.

A lease of land, executed in 1835, contained a covenant on the part of the lessor, his heirs and assigns, that at any time during the continuance of the demise, at the request and cost and charge of the lessee, his heirs or assigns, the lessor, etc., would convey the property in fee simple upon payment of a designated sum. Plaintiff's bill to enforce specific performance of this covenant alleged that he became owner of the

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leasehold interest by virtue of a certain deed, filed with the bill; that the defendant owned the reversion in the land and was notified by plaintiff of his desire to redeem the rent and that plaintiff had tendered the required sum of money and a deed to be executed conveying the fee. Upon demurrer, *held*, that it was not necessary to set out in the bill all of the assignments of the leasehold interest from the original lessee down to plaintiff, in order to show his right to enforce the covenant; and that the covenant giving the right to redeem to the lessee, his heirs and assigns, enures to the benefit of the plaintiff as the assignee of an assignee.

Decided December 2nd, 1908.

Supplemental Opinion filed February, 11th, 1909.

Appeal from the Circuit Court of Baltimore City (ELLIOTT, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and WORTHINGTON, JJ.

Arthur W. Machen and Arthur W. Machen, Jr., for the appellant.

I. The bill wholly fails to aver how Rosa Krulewitch's title to the lot, if any such she had, originated, and whether she claimed under or adversely to Robert Bolton and James Glanville, the original lessees. The bill does not state whether Robert Bolton and James Glanville are dead, or whether they or either of them ever parted with the title to the term for years.

Hence, the bill cannot be sustained, unless it be law that under a lease containing a covenant such as that set out above the lessor and those claiming under him are bound to convey the reversion, not merely to the lessees and their successors

in title, but to any person who comes forward and demands a deed offering to pay the sum of money mentioned in the covenant.

We submit that to state that proposition is to answer it.

The lessor is bound, if at all, only to the lessees and those in privity with them. As the bill fails to aver any privity between the plaintiff and the original lessees, we submit that the demurrer should for this reason be sustained.

Indeed, even if the bill had alleged generally the plaintiff to have succeeded by *mesne* assignments to the title of Bolton and Glanville, that averment would be insufficient. It would be necessary for it to go further, and by setting out the several assignments, show *how* the title had devolved from the original lessees to the plaintiff, so that the Court may judge of the sufficiency of his title.

"In an action brought by the assignee of a term all the assignments of the term down to himself should be specifically stated, for he, being privy to them, shall not be allowed to plead generally that the estate of the lessee of and in the demised premises came to him by assignment." 1 *Chitty on Pleading*, 16th Am. Ed., *382. Accord: *Gould on Pleading*, sec. 32; *Alexander's British Statutes*, p. 348.

The same doctrine applies in equity. 1 *Daniel's Chancery Practice*, 1st Am. Ed., 369-371; *Miller's Equity Procedure*, page 117, note 10; *Davis v. James*, 26 Ch. D. 778.

The last case shows that the rule, being of great substantial assistance to the Court and tending to promote the ends of justice, is not affected by modern codes (of which we fortunately have none in Maryland) relaxing many of the rules of equity pleading. Definiteness and certainty is especially requisite in a bill for specific performance, which, in any case of ambiguity, is to be taken most strongly against the plaintiff. 20 *Enc. of Pl. and Pr.*, pages 435-436.

II. A bill for specific performance "should contain an *offer to do* equity, and should show that the plaintiff is able and

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willing to perform his portion of the contract." 20 *Enc. of Pl. and Pr.*, page 458; *Carswell v. Walsh*, 70 Md. 507.

The bill contains no offer to bear the "cost and charge" of the conveyance, the express requirement and condition of the covenant. These words "cost and charge" in this connection have received judicial interpretation, and it has been held that they require the person claiming the right to the conveyance to pay the reasonable counsel fees of the landlord incurred in examining the title of the applicant who claims the benefit of the covenant, in order to make sure that the applicant is indeed the person legally entitled to the benefit of any covenants that run with the lease. *Re Baylis* (1907) 2 Ch. 54; *Fitzsimmons v. Mostyn* (1904), A. C. 46, affirming (1903) 1 K. B. 349.

The words at the "request, cost and charge" of the tenant mean: " 'That the landlord is to be at no cost.' That is reasonable enough at any rate; but whether it is reasonable or not, that is the bargain. * * * A solicitor conducting negotiations for a renewal on behalf of his client under a covenant of this kind necessarily incurs whatever costs he reasonably incurs, in order to satisfy his client that he is granting the renewed lease to the proper person. He would be guilty of negligence if he did not take every proper precaution to see that the person demanding the renewed lease is entitled to it, and, therefore, what he does reasonably he does necessarily. Whatever is, therefore, reasonable in that sense seems to me to come within the costs and charges of the lessee. It need not always happen that any costs should be incurred, yet, with some trifling exceptions, costs are incurred in almost every case unless when the grant is direct to the original lessee, in which case he may be treated as the owner of the lease. But property very seldom remains in the same hands, unaffected by settlements, or mortgages, or devolutions of title, for a period of fourteen years, and something requiring investigation is almost sure to occur in every case." (1907) 2 Ch. 58-59.

Redemptions under the *statute* are to be distinguished; for the statute, (Code, 1904, Art. 21, sec. 88) does not require that the redemption shall be at the "cost and charge" of the tenant. Therefore, no law or practice under the statute can have any bearing here.

As was pointed out by counsel in *Mostyn v. Fitzsimmons* (1903), 1 K. B. 349, 351, a construction of the words "costs and charges" which would confine their operation to the expenses of preparing the deed would deprive them of all effect whatsoever; for without those words the tenant, being a purchaser, would be required, in England as in Maryland, to pay those expenses without any express provision.

III. We further contend that under the peculiar terms of this covenant, even if the plaintiff had alleged and were able to prove a regular succession of assignments from Bolton and Glanville down to Rosa Krulewitch, from whose administrator it acquired whatever interest it may have in the land, still the plaintiff would not be the proper person under the terms of the covenant to enforce performance thereof.

The covenant contemplates a conveyance of the reversion in fee—inheritable property which passes to the heir rather than to the administrator. The covenant provides that the conveyance is to be made "at the request and cost and charge of the said Robert Bolton and James Glanville, their *heirs* or assigns." Moreover, the conveyance is to be made to "said Robert Bolton and James Glanville, their *heirs* and assigns."

This word "*heirs*" cannot be ascribed to inadvertence. On the contrary, throughout the lease a careful and technically accurate discrimination is made between "*heirs*" and "executors and administrators." The lease is expressed to be given to the lessees, "their *executors, administrators* and assigns." The habendum is likewise to them, their *executors, administrators* and assigns." The rent is to be paid by the lessees, their *executors, administrators* and assigns," but is reserved to the lessor, "her *heirs* and assigns."

The same distinction between "executors and administrators" and "*heirs*" appears from a comparison of the covenant

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for renewal, with the covenant more particularly involved in this case. The renewal is to be "on the request and at the cost and charge of the said Robert Bolton and James Granville, their *executors, administrators* and assigns;" and the new lease is to be made to "the said Robert Bolton and James Granville, their *executors, administrators* and assigns."

In other words, the lease clearly contemplates that while the benefit of the covenant for renewal shall devolve upon the executor or administrator, the benefit of the covenant for a conveyance in fee shall be inherited by the heir. As such a contract contravenes no rule of law, effect must be given to it, so that an administrator can have no interest in the covenant. A covenant to execute further assurances at the request of the *heir* of the grantee is not broken by a failure to execute a further assurance at the request of the *executor*. *Kingdon v. Nottle*, 1 M. & S. 355.

But, as we have just shown, even if Rosa Krulewitch had succeeded to the title of Bolton and Granville, it would be her *heir* and not her *administrator*, who alone according to the terms of the covenant would be entitled to its benefit.

IV. The alleged covenant does not "concern the thing or estate demised," or in other words does not pertain to the relation of landlord and tenant, and consequently does not run with the land, so as to be enforceable against an assignee of the reversion and in favor of an assignee of the term for years even if the plaintiff were alleged and proved to be such an assignee, and even if the language of the covenant had been such as to indicate that the benefit of it should pass to the administrator rather than the heir of a tenant. This has lately been held after full consideration by the English Court of Appeal. *Woodall v. Clifton* (1905), 2 Ch. 257.

The reasoning is that a covenant for conveyance of the fee does not concern the relation of landlord and tenant—does not, for example, like a covenant for renewal, provide for a continuation of that relation—but rather provides for a final termination of the relationship and all its incidents.

V. We contend that the alleged covenant cannot be enforced specifically against an assignee of the reversion because of the Rule against Perpetuities. In a late Maryland case on the subject of perpetuities, this Court, speaking through Chief Judge McSherry, quotes with approval the definition of a perpetuity given by *Lewin Lee Graham v. Whitridge*, 99 Md. 274.

It is well settled that a covenant to convey real estate to another person at the latter's option at any time in the remote future, more than a life or lives in being and twenty-one years thereafter, while it is a good personal contract enforceable at law by action for damages against the covenantor, his executor or administrator, yet cannot be specifically enforced in equity against an alienee of the land so as to create virtually an equitable interest in land to spring up at a remote period. *London & S. W. Ry. Co. v. Gomm*, 20 Ch. D. 562; *Trevelyan v. Trevelyan*, 53 L. T. n. s. 853; *Winsor v. Mills*, 157 Mass. 362; *Tyrrell's Estate* [1907], 1 Ireland, 292; *Gray on Perpetuities*, 2d Ed., secs. 230 B, 275, 275A; *Woodall v. Clifton* [1905], 2 Ch. 257; *Worthing Corp. v. Heather* [1906], 2 Ch. 532; *Starcher Bros. v. Duty* (W. Va.), 56 S. E. 524; *Starcher Bros. v. Duty* (W. Va.), 56 S. E. 527.

All of these authorities distinctly declare that a covenant giving an option to purchase land cannot be specifically enforced, at any rate against a purchaser of the land, unless the option must by its terms be exercised if at all within the limits prescribed by the Rule against Perpetuities.

The same law applies where the covenant giving the option is in favor of a tenant and is contained in a lease for more than 21 years, or is, in other words, to use the popular and statutory phrase, "a covenant for redemption," exercisable at a remote period. This is laid down as settled law in standard text-books and is supported by *every decided case in which the point has arisen*. *Woodall v. Clifton* [1905], 2 Ch. 257; *Worthing Corporation v. Heather* (1906), 2 Ch.

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532 (holding that the covenant cannot be specifically enforced, but will support an action at law for damages against the original covenantor); *Tyrrell's Estate* [1907], 1 Ireland, 392; *Gray on Perpetuities*, 2d Ed., sec. 230A.

The result necessarily follows from Mr. Lewin's definition of a perpetuity, which was approved by this Court in *Graham v. Whitridge*. The fee certainly does not vest in the tenant until his option to purchase is exercised, and (if the covenant is valid), the limitation of the fee over to the tenant is not destructible by the lessor without the tenant's consent. Hence, as the option may be exercised according to its terms at any time within 99 years, the conclusion is inevitable that the option is so far void that it cannot be enforced specifically as an equitable limitation of the fee binding on grantees of the reversion.

There is more reason for applying this doctrine in Maryland than elsewhere; for the very basis of our original ground-rent system was to split up the ownership of the land into two separate interests, the fee and the leasehold, each of which vested on the execution of the lease and should *last forever*. In accordance with this scheme, this Court held that the covenant for *renewal* could be enforced even after the lapse of the original term, so as to preserve the two interests, leasehold and fee, forever. *Banks v. Haskie*, 45 Md. 207.

Now, if such a covenant as that involved in this case were enforced specifically, it would put an end to the fee-simple interest and thus terminate one of the two interests into which the ownership of the land is split up, and which it was the very object of our ground-rent system to keep alive perpetually.

Covenants for redemption were not part of the original ground-rent system of Baltimore, but are an innovation, introduced after the system had become established. *Harris's Entries*, published in 1801, and containing a full collection of precedents of conveyancing as then practiced in Maryland, has no form for a covenant of redemption.

The Legislature thought fit, in 1884, to break up for the future the ground-rent system; but that legislation cannot, and does not purport to, affect leases executed prior to that time. The fact remains that the Common Law and policy of this State encouraged irredeemable rents. The prevalence of the system of ground rents in this State, therefore, so far from being a reason for departing from the authorities above cited as to the non-enforceability in equity of covenants in leases for a conveyance of the fee, is rather an argument for adhering to the law as laid down in England, in Ireland, and in other States of the Union.

In Ireland, from which our ground-rent system was taken, a provision for redemption of a rent at any time at the option of the person who owns the land subject to the rent has been held to be unenforceable specifically because of the Rule against Perpetuities. *Tyrrell's Estate* [1907], 1 Ireland, 392. In view of the authority attached by this Court in *Banks v. Haskie* to Irish cases on the subject of ground rents, this decision is, we submit, of great weight.

But, if it be said that covenants for redemption were common in leases prior to the Act of 1884 and have been assumed by the legal profession to be valid, we are not prepared to admit the truth of such assertions, nor to concede that, if admitted, they should control the decision of this case in opposition to the uniform tenor of the authorities, and to the clear and convincing reasoning by which those authorities are supported.

That covenants for redemption were sometimes inserted in 99-year leases prior to 1884 is true; but that such covenants were *usual* is denied. When any such covenants were inserted, it was usually stipulated that the option to redeem should be exercised, if at all, within some limited time less than twenty-one years—as five years, or ten years, in which case the Rule against Perpetuities would have no application. That covenants for conveyance of the fee at any time during 99-year leases cannot have been very common, is shown by

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the fact that no case has come before this Court in which any such covenant was in any way involved, although numerous cases relating to covenants for renewal and to redemptions under the statute have come up. Instruments in form of lease containing covenants for redemptions intended as substitutes for mortgage security, and in equity having the effect of mortgages, under a practice once prevalent in Maryland and recognized in *Posner v. Bayless*, 59 Md. 56, 60, and other cases, form a class to themselves. In such cases, the instruments are not enforced according to their terms, but equity, looking at the substance rather than the form, regards the transaction as a mortgage, as would be done in the case of an absolute deed intended as security for a debt and not succeeded by a lease.

Moreover, even if such covenants had been common and had been assumed (by lawyers who were not familiar with the Rule against Perpetuities) to be enforceable against assignees of the reversion, a decision in our favor will shake no titles. As to leases executed since 1884, the question cannot arise. As to older leases, if the covenants have been performed, the reversioner's deed would convey a good title irrespective of the question whether he might have successfully resisted specific performance. If the covenant has not been performed, it must be either because the reversioner, or the leasehold owner, knew that the covenant was unenforceable, or else because the tenant did not think it worth while to pay the sum fixed for redemption. It is unlikely that in any case where the burden of the rent is to any considerable extent greater than the sum fixed for redemption, so long a period as that from 1884 to 1908 would have been allowed to elapse by the tenants without claiming performance of the covenant unless they were advised that the validity of the covenant was at least questionable.

Maughlin v. Perry, 35 Md., decided, and could decide, no question pertaining to the Rule against Perpetuities, as the lease in that case was for less than 21 years, so that the

estate created by exercise of the option of purchase necessarily vested, if at all, within the limits of the Rule.

It will be argued by the other side that the object of the Rule against Perpetuities is to prevent the "tying up" of property beyond the limits of the Rule, and that such a covenant as that involved in this case does not "tie up" the property, but rather tends to free it from the incumbrance of the rent. But the *way* in which the rule attempts to prevent the "tying up" of property is by requiring all future interests to "*vest*" if at all within the limits prescribed by the rule. As the fee under such a covenant does not necessarily vest in the tenant within those limits, the covenant, regarded as a limitation of the land, is void.

But in point of fact, the question whether the covenant "ties up" the property depends on whether it is looked at from the standpoint of the landlord as well as the tenant. It is true that the *tenant* is entirely free. He is *dominus* of the situation. But the hands of the landlord, who has a vested legal estate, are effectually tied. *He* cannot tell whether the tenant's option will be exercised or not, and consequently his estate is subject to the very uncertainties of value and continuance that the Rule against Perpetuities aims to prevent.

The fact (if it be a fact) that this covenant runs with the land does not make it any the less obnoxious to the Rule against Perpetuities.

Before the decision in *Woodall v. Clifton* [1905], 2 Ch. 257, settling the law for England in regard to the effect of covenants by lessors giving the lessees or their assigns the right or privilege of purchasing the reversion at any time had been pronounced, a full discussion of the subject appeared in an interesting and masterly article in the *Solicitor's Journal* (42 Sol. Journ. 628), which completely anticipates and answers some objections which are likely to be urged against the reception of the doctrine of that case in jurisdictions where the judgments of the English and the Irish Courts are not of conclusive authority.

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In reference to the appeal from the order of the Circuit Court overruling petitions of Charles S. Hollander and Else Hollander and Lee M. Hollander praying rescission of the order of publication and quashing of proceedings.

1. It is established by decisions of the Supreme Court of the United States that no suit *in personam* can constitutionally be prosecuted in any State Court without personal service of process. *Pennoyer v. Neff*, 95 U. S. 714; *Hart v. Sansom*, 110 U. S. 151; *Scott v. McNeal*, 154 U. S. 154. It is settled law that a suit in equity for specific performance is a proceeding *in personam*. *Dorsey v. Omo*, 93 Md. 74; *Penn v. Lord Baltimore*, 1 Ves. 444; *Fry on Specific Performance*, sections 123, 124.

It necessarily follows that a suit for specific performance cannot be maintained against a non-resident on service by publication merely, although the land may lie within the State, at least unless the State by express legislation has given jurisdiction to the Court to proceed *in rem* with respect to the land in the exercise of a statutory jurisdiction differing from the exercise of the ordinary jurisdiction in suits for specific performance. *Spurr v. Scoville*, 3 Cush. Mass. 578.

It has been held by this Court, in a case decided when the condition of the statute law of this State with regard to suits for specific performance against non-residents was the same as it is now, that a suit for specific performance of a covenant by the lessor in a lease for 99 years for a renewal of the term could not be maintained against non-resident successors to the title of the lessor upon publication made pursuant to the existing statute. *Worthington v. Lee*, 61 Md. 530.

2. Assuming that there is statutory ground for a proceeding by publication in such a case as this, have the statutory provisions as to notice by publication been complied with?

The statute provides that the Order of Publication shall state "the substance and object of the bill." The rule is well established that "to secure the benefit of the provisions of the

Code authorizing constructive notice in cases like this there must be a *strict compliance* with this requirement." *Hardester v. Sharretts*, 84 Md. 150; *Dorsey v. Dorsey*, 30 Md. 534.

The only description of the land in this Order of Publication is the following:

"A lot of ground on the east side of a ten-foot alley in the rear of Lombard and Frederick streets in the City of Baltimore, the description of which lot of ground is fully set out in the bill."

How is the non-resident warned by such a notice that *his* property is in danger? How can he tell from such a description whether *his* lot or some other property on an alley "in the rear of Frederick and Lombard streets" is affected? As the very requirement of the statute is that the substance of the bill must be stated in the order, the reference to the bill as containing a more particular description cannot help. So, too, references to the Land Records of Baltimore City can be of no assistance to a non-resident; for he being *ex hypothesi* absent from the State can have no access to those Land Records.

The obvious purpose of the statute is that the published order shall *on its face* give due notice to the non-resident. If the statute were construed as authorizing any such meagre order of publication as that in this case, it would not afford the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. For even in cases where publication is permissible, there must be a publication of such a character as to give the defendant reasonable warning of the material facts—especially the fundamental fact of what property it is which is to be affected by the suit.

3. This petition of Lee M. Hollander was set for hearing *by the plaintiff* (the appellee). Subsequently, on September 18th, the appellee filed an answer denying that Lee M. Hollander was a resident of Maryland. This answer was filed only the day before the hearing, which took place on Septem-

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ber 19th. Consequently, Lee M. Hollander had no opportunity to take testimony in support of any allegations of his petition which were denied or controverted by the answer.

JUDGE ELLIOTT says that the averments of the answer are to be taken as true, even where they controvert the allegations of the Petition, because the case stood for hearing on petition and answer. But for the very reason that setting a case for argument on bill, or petition, and answer admits the averments of the answer, it is settled law that a case can be set for hearing on bill, or petition, and answer, *only by the plaintiff or petitioner*, as the case may be. *Somerville v. Marbury*, 7 G. & J. 281; *Paul v. Nixon*, 1 Bland, 200, note; *Warren v. Twilley*, 10 Md. 39, 47; *Miller's Eq. Proc.*, page 319.

If the appellee could set Lee M. Hollander's petition down for argument on petition and answer he would preclude the appellant from proving the facts alleged in the Petition and denied in the Answer. Hence we submit that whatever the ruling of this Court may be upon the other points in the case, the order dismissing Lee M. Hollander's petition should be reversed, and that if the case should be remanded for further proceedings, Lee M. Hollander should be allowed to take testimony in support of the allegations of his Petition so far as they may be taken to be denied or avoided by the averments of the appellee's answer.

The proceeding *in personam* upon the assumption that the covenant in question is capable of enforcement between the parties to the present suit by a bill in equity for specific performance, the further question exists whether such a suit, if prosecuted as a proceeding *in rem*, and without personal service of process, can be sustained under that clause of the Constitution of the United States, which forbids the passage by any State of any law impairing the obligation of contracts.

The contract of the covenant in question, made under the laws of Maryland existing at the date of the lease, subjected the lessor, or the lessor, her heirs and assigns, to certain personal obligations; it was out of the power of the Legislature afterwards to modify this contract by putting into it another

term, by converting the original right *in personam* into a right *in rem*.

The contract of the covenant in question as made in 1835, under the law of Maryland *then existing* subjected the lessor, or heirs or assigns, to certain *personal* obligations only. No statute then authorized, or provided for, an equitable lien, or right *in rem*, of the kind asserted by the appellee to be created by the statutes now on the statute book. Any State legislation so altering the contract of this covenant as to make it import the establishment of a lien upon the estate of the lessor in the ground leased, impairs the original obligation of the contract, and therefore is beyond the constitutional power of the State.

Hence, if the Code provisions relied upon by the appellee have the construction and effect which the appellee claims that they have, such legislation is void under the prohibitory clause of the Constitution of the United States.

The bill does not seek a proceeding under the Act 1906, Chapter 337, and the consideration of that extraordinary act is not involved in this case. The Act is clearly unconstitutional as applied to any lease executed before its passage. Besides other obvious grounds of objection under the constitution of the United States and the Fourteenth Amendment thereto, and also under the Constitution of Maryland, it is observable that it undertakes under some circumstances to make landlords bear certain of the expenses of redemption, and therefore cannot be applied to leases executed prior to the statute and containing a stipulation that the "costs and charges" of redemption shall be borne by the tenant. If so applied, it would impair the obligation of contracts in violation of Article 1, Section 10, of the Constitution of the United States.

R. E. L. Marshall and John G. Schilpp, for the appellee.

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THOMAS, J., delivered the opinion of the Court.

The Central Metal and Supply Company of Baltimore City, "a corporation duly incorporated under the laws of the State of Maryland," having purchased the leasehold estate in a certain lot of land in Baltimore City, brought this suit on the 31st day of May, 1907, against the appellants, as the present owners of the reversion in said lot, for a specific performance of the covenant in the lease of the lessor, "her heirs and assigns," upon payment of the amounts specified therein, to convey the fee to the lessees, their "heirs and assigns." The bill alleges that the defendants, Charles Hollander and Elsie Hollander, his wife, and Lee M. Hollander are non-residents, and that the plaintiff, in January, 1907, addressed a letter to these defendants notifying them of its desire to redeem the ground rent under the lease, and prepared and forwarded to them for execution, a deed from them to the plaintiff of the fee in said lot, which they refused to execute on the ground that "the said rent is not redeemable." After an order of publication had been passed against the non-resident defendants, Charles S. Hollander and wife filed a motion to rescind the order, and to quash the proceedings, on the ground (1) that a suit for the specific performance of a contract is a suit *in personam*, and can not be maintained against a non-resident on service by publication, and (2) that the order of publication in this case does not contain a sufficient description of the property to inform the defendants of the property involved in the suit. Sometime after this motion was filed, Lee M. Hollander filed a similar motion, alleging as an additional reason for rescinding the order as against him, that at the time of the bringing of the suit he was a resident of the State of Maryland.

The case of *Worthington v. Lee*, 61 Md. 530, was for specific performance of a covenant for a renewal of a lease for ninety-nine years, renewable forever, and for an injunction to restrain an action of ejectment for the recovery of the premises. Some of the non-resident defendants appeared and pleaded to the jurisdiction of the Court to grant relief, while

against others interlocutory decrees were entered in default of appearance and answer. The notice to non-residents was by publication, and the Court in dealing with the case as against the non-resident defendants, said, "If the application was for a sale of the property, or for a simple conveyance thereof, those objects could be accomplished by the appointment of a trustee, as provided by the Code, Art. 16, Secs. 67, 135. But those provisions of the statute do not apply in a case like the present, where the object of the decree is to secure to the plaintiff the specific execution of the covenant, whereby she is entitled to obtain a renewed lease, with important and valuable personal covenants of the lessors, and without which it would not be an instrument of the character contemplated by the covenant decreed to be performed. The Court could direct a lease for ninety-nine years to be made by a trustee, but not with covenant for renewal, and other personal covenants, to bind personally the owners of the reversion, their heirs and assigns. The Court could, through the instrumentality of a trustee, direct the conveyance of an estate, or the transfer of a right, but not the making of personal covenants, in the absence of the parties, to bind them personally, and those who may stand in privity with them. The Court possesses no such power as that inherently and the statute does not confer it."

In the case of *Hart v. Samson*, 110 U. S. 151, cited and relied on in *Worthington v. Lee*, *supra*, the Court said: "It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the Court for that purpose." And in the case of *Arndt v. Griggs*, 134 U. S. 316, in passing upon a Nebraska Statute, and dealing with the right of the State to provide for notice to non-resident defendants, the Court said that the State had "control over property within its limits; and the condition of ownership of real estate therein, whether the owner be a stranger or a citizen, is subject to its rules concerning the holding, the transfer, liability to obligations,

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private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits—its process goes not beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice.”

Sec. 117 of Art. 16 of the Code of 1904, is as follows: “If in any suit in chancery, by bill or petition, respecting in any manner the sale, partition, conveyance or transfer of any real or personal property lying or being in this State, or to foreclose any mortgage thereon, or to enforce any contract or lien relating to the same, or concerning any use, trust or other interest therein, any or all of the defendants are non-residents, the Court in which such suit is pending may order notice to be given to such non-residents, of the substance and object of such bill or petition, and warning them to appear by a day therein stated.” Sec. 127 of Art. 16, provides how the notice shall be given, and Sec. 91 authorizes the Court, whenever the execution of a deed of any kind is decreed, to appoint a trustee to execute it.

The prayer of the bill and the covenant here sought to be enforced is for conveyance to the appellee of the lot described in the lease, and while the Court could not enforce a decree requiring a non-resident to execute a deed for the property, its decree may be made effective under the provisions of the Code, by the appointment of a trustee to convey the title of the appellants, and to that end the proceedings are *in rem* and not *in personam*. *Miller's Equity Procedure*, Sec. 120; *White v. White*, 7 G. & J. 208; 22 *Am. & Eng. Ency. of Law*, 917; *Phelps on Juridical Equity*, Secs. 85, 223.

The order of publication, which is set out in the record, in addition to describing the land as the “lot of ground on the East side of a ten foot alley in the rear of Lombard and Frederick Streets in the City of Baltimore;” and as being subject to the annual ground rent of thirty-six dollars “created by the lease from Charlotte Bolgiano to Robert Bolton and others, dated July 18, 1835, and recorded in Liber T. K..

No. 262, folio 294, etc.," states that an undivided one-third interest in the reversion in said lot is vested in Edward Hollander, trustee for Amelia Hollander, for life, remainder to Charles S. and Levi M. Hollander, and that the remaining two-thirds interest is vested in said Charles S. and Levi M. Hollander, "as by reference to Liber R. O., No. 2243, folio 93 will appear," and that the plaintiff notified the defendants by letter of its desire to redeem said rent, and prepared and had sent to them for execution, a deed from them to the plaintiff for their interest in said lot which they declined to execute and returned. The reference to the lease under and by virtue of which the defendants received the annual rent of thirty-six dollars, to their interest in the reversion, and to the letter and deed sent to them, could have left no doubt in their minds as to the land referred to, and we think was sufficient notice to the defendants of the subject matter of the suit. *Mewshaw v. Mewshaw*, 2 Md. Ch. 12; *Phelps on Juridical Equity*, 313.

The petition of Lee M. Hollander was answered by the plaintiff, denying that he was a resident of the State of Maryland, and again alleging that he was a non-resident. The matter, as stated in the opinion of the Court below, was submitted, without proof, on the petition and answer, and his motion, and the motion of Charles S. Hollander, was, and we think properly, overruled. Where a case is submitted on petition and answer, the truth of the facts alleged in the answer is taken to be admitted, but the privilege of having a case so heard belongs only to the petitioner. The record does not disclose who set this motion down for hearing, but as the plaintiff in this case had no right to do so on the petition and answer, we must assume that it was done at the instance of the petitioner. *Miller's Equity Procedure*, Sec. 255 and notes.

After these motions were overruled, the defendants demurred to the bill on the following grounds: (1) that the bill does not show plaintiff's right to take advantage of the covenant in the lease; (2) that the plaintiff does not offer to

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comply with the terms of the covenant; (3) that the covenant is not one running with the land, and cannot be enforced by the assignee of the lessees against the assignees of the lessor; and (4) that the covenant cannot be enforced against the assignee of the reversion because it violates the Rule against Perpetuities.

The bill charges that the plaintiff, on the 9th day of January, 1907, obtained by deed from Benjamin Krulewitch, administrator, the leasehold property, a description of which is set out in the bill and in the plaintiff's deed filed with the bill; that the lot of ground so obtained by the plaintiff is subject to an annual ground rent of thirty-six dollars, created by a lease from Charlotte Bolgiano to Robert Bolton and others, dated July 18, 1835, and recorded among the Land Records in Liber T. K., No. 262, folio 294, &c., and a certified copy of which is filed with the bill; "that the said lease contains a covenant on the part of said lessor, her heirs and assigns, that at any time during the continuance of said demise at the request and cost of said lessees, their heirs or assigns, and on their paying six hundred dollars, with all rent accrued and accruing, said lessor, her heirs and assigns, would cause to be delivered to said lessees, their heirs and assigns, a good and sufficient deed in fee simple, of and for the said property;" and that the plaintiff bought said property "upon the express condition that the said rent could be extinguished at its option at any time;" "that the reversion in and to said lot, with the right to collect the annual rent of thirty-six dollars, is now vested in said defendants, as follows: (a) Edward Hollander, trustee, one of the above-named defendants and trustee in the case of *Edward Hollander v. Amelia Hollander et al.*, in the Circuit Court of Baltimore City (Docket 24A, folio 245), holds a one undivided third interest therein, for Amelia Hollander, another of the above-named defendants, for life, with remainder to Charles S. Hollander and Lee M. Hollander, other above-named defendants, absolutely. (b) Said Charles S. Hollander and Lee M.

Hollander hold the other two-thirds undivided interest therein; as would appear by reference to the deed to said named defendants of said lot of ground, dated May 10, 1905, and recorded among the said Land Records in Liber R. O., No. 2143, folio 93, &c." That the plaintiff notified the non-resident defendants by letter of its desire to redeem said ground rent, and in January, 1907, prepared and had sent to them for execution, a deed to the plaintiff of their interest in said lot, which deed they refused to execute on the ground that by the terms of said lease the rent was not redeemable; that on the 20th of May, 1907, the plaintiff tendered to Edward Hollander, trustee, \$210.30, it "being one-third of the said redemption money, together with the proportionate part of the accruing rent to the date thereof, and likewise, on May 31, 1907, tendered to Arthur W. Machen, Jr., Esq., solicitor of the defendants, Charles S. Hollander and Elsie Hollander, his wife, and Lee M. Hollander, the sum of \$420.60, being their two-thirds share of said redemption money, together with their proportionate part of the accruing rent to said date;" and that at the same time plaintiff handed to said trustee and said solicitor a draft for a new deed, "requesting them, and each of them, to have the same properly executed so as to vest" the plaintiff "with an absolute fee simple title in and to the property," which deed is filed with the bill, and which they refused to execute or to have executed; and that said Machen was the solicitor of the defendants "in this matter." The prayer of the bill is for leave to bring into Court the sum of \$630.90 so tendered, and that a trustee may be appointed to convey to the plaintiff the reversion in said lot, etc.

(1) The general rule is that the bill must state clearly plaintiff's right to the relief prayed, and counsel for the appellants insist that in compliance with this rule, the bill should have set out all of the assignments from the original lessees down to the plaintiff, in order to show the right of the plaintiff, as assignee of the leasehold estate, to the benefit

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of the covenant sought to be enforced. The leasehold interest was conveyed by the lease to the lessees, their executors, administrators and assigns, and the bill charges that the plaintiff is the owner of the leasehold property described in said lease by virtue of the deed from Benjamin Krulewitch, administrator. If the covenant is one that runs with the lease, in favor of the assignee of the lessees, the right to the leasehold interest created by the lease entitles the owner to the benefit of the covenant. In *Spencer's Case*, 1 Smith's Leading Cases, p. 77, "It was resolved that the assignee of the assignee should have an action of covenant. So of the executors of the assignee of the assignee; so of the assignee of the executors or administrators of every assignee, for all are comprised within this word (*assignees*), for the same right which was in the testator, or intestate, shall go to his executors or administrators." The bill in substance alleges that the plaintiff is the assignee of the leasehold interest or estate created by said lease. It was not necessary to allege all the circumstances tending to prove that fact. While "every material fact to which the plaintiff means to offer evidence ought to be distinctly stated in the premises; for otherwise he will not be permitted to offer or require any evidence of such fact. A general charge or statement, however, of the matter of fact is sufficient; and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge; for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs." *Story's Equity Pleadings*, Sec. 28 (5th Ed.); *Miller's Equity Procedure*, Sec. 92; *Phelps on Juridical Equity*, Secs. 49, 55; *Mewshaw v. Mewshaw*, *supra*; *Dennis v. Dennis*, 15 Md. 73. The covenant is, at the request, etc., of the lessees, "their heirs and assigns," to convey to the lessees, their heirs and assigns, etc., yet the manifest intention of the parties to the lease, as gathered from the whole instrument, was to give to the lessees and those claiming under them, viz: "their executors, administrators and assigns," the

benefit of the covenant. This, however, is not an action at law for a breach of the covenant, and the doctrine of specific performance does not depend upon such technical distinctions. Wherever, and without regard to the form and technical character of the contract, performance of a covenant in respect to lands would have been decreed between the parties to it, it will, in the absence of controlling intervening equities, "be decreed as between persons claiming under them in privity of estate, or of representation, or of title." 2 *Story's Eq.*, Secs. 788-790, 714, 715, 791 (5th Ed.); *Worthington v. Lee*, supra.

(2) The second objection to the bill is that the plaintiff does not offer to bear the "cost and charge" of the conveyance of the fee to him, which, it is claimed, include a counsel fee to the defendants for the examination of plaintiff's title in order to ascertain if he is legally entitled to the benefit of the covenant. In the case of *Oelrichs v. Spain*, 15 Wall. 21, the Court held that counsel fees were not recoverable in a suit on an injunction bond, the condition of which was to satisfy and pay "all costs, damages and charges" which should be occasioned by such writ of injunction, and said that the disallowance of such fees "rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy." This case was cited and relied on in *Wood v. State, use of White*, 66 Md. 61, where, in a suit on an injunction bond, the Court held that the plaintiff could not recover fees paid counsel for procuring a dissolution of the injunction. In *Johnson v. Glenn*, 80 Md. 369, a provision in a mortgage authorizing "the payment of all expenses incident to such sale," was said to include services of an auctioneer, cost of advertising, etc., but not an allowance for commissions. Counsel fees "are not allowable" as costs "in the absence of a statute or in the absence of some agreement or stipulation specially authorizing the allowance thereof." 11 *Cyc.* 104. While parties must be left to contract as they please, in the absence of a clear undertaking to do so, one

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party to a contract should not be required to pay for services rendered for the benefit of the other, and whatever may have been held on the subject elsewhere, under the decisions in this State the "cost and charge" which the plaintiff under the lease is required to pay, cannot be held to include a counsel fee to the defendants for examination of the plaintiff's title.

(3) The next ground of the demurrer is that the covenant to convey the fee to the lessees, "their heirs and assigns," is not a covenant running with the land. In *Glenn v. Canby*, 24 Md. 127, the Court stated as the established doctrine, "that a covenant to run with the land must extend to the land, so that the thing required to be done will affect the quality, value, or mode of enjoying the estate conveyed, and thus constitute a condition annexed or appurtenant to it; there must also be a privity of estate between the contracting parties, and the covenant must be consistent with the estate to which it adheres, and of such a character that the estate will not be defeated or changed by a performance of it." This is the doctrine asserted by Mr. Poe in 1 *Poe's P. & P.* 253 (1st Ed.), and reiterated by this Court in *Whalen v. B. & O. R. R. Co.*, 108 Md. 11. In *Taylor's Landlord and Tenant*, Sec. 261 (7th Ed.), it is said that "In order that a covenant may run with the land, its performance or non-performance must affect the nature, quality or value of the property demised, independent of collateral circumstances, or must affect its mode of enjoyment. It must not only concern the land, but there must be a privity of estate between the contracting parties." "In order that a covenant may run with the land, that is, that its benefit or obligation may pass with the ownership, it must respect the thing granted or demised, and the act covenanted to be done or omitted must concern the land or estate conveyed. Whether a covenant will or will not run with the land does not, however, so much depend on whether it is to be performed on the land itself as on whether it tends directly or necessarily to enhance its value or render it more beneficial and convenient to those

by whom it is owned or occupied, for if this be the case every successive assignee of the land will be entitled to enforce the covenant." 11 *Cyc.*, 1080. "Such covenants, and such only, run with land as concern the land itself. in whatsoever hands it may be, and become united with, and form a part of, the consideration for which the land, or some interest in it, is parted with, between the covenantor and covenantee." *Washburn on Real Property*, Sec. 1205.

That the covenant in this case is within these requirements, as affecting the interest in the land demised, as enhancing the value thereof, and as forming a part of the consideration for the acceptance of the lease by the lessees, would seem to be free of doubt. The learned counsel for the appellants contend, however, that the performance of the covenant would defeat the estate of the lessor, and change the character of the estate of the lessee, and that it therefore falls within the restrictions of *Glenn v. Canby*, *supra*. But in *Taylor's Landlord and Tenant*, Sec. 262, it is said: "The right of renewal constitutes a part of the tenant's interest in the land, and a covenant to renew is consequently binding upon the assignee of the reversion. So the grant of an additional term or the right to purchase is, for many purposes, to be considered a continuation of the former lease; and if there is nothing in the lease to show that *such right* or renewal was intended to be confined personally to the lessee, they will enure to his assignees or executors, without their being particularly named."

In the case of *Maughlin v. Perry*, 35 Md. 352, the covenant on the part of the lessor was as follows: "And the said party of the first part, for himself, his heirs and assigns, doth hereby covenant and agree with the party of the second part, his heirs and assigns, to sell and convey unto the party of the second part, his heirs and assigns, the above described property and premises for the sum of fifteen hundred dollars at any time before the expiration of this lease or tenancy." The lessor died after having sold the property, and suit was

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brought by the assignees of the lessee against the assignee of the lessor for a specific performance of the covenant, and the Court, in affirming a decree requiring the defendant to convey the property to the plaintiff in accordance with the terms of the covenant, said: "As a part of the consideration of the lease constituting the contract between the parties, Wells, the lessor, covenanted to sell the property to Hynson, his lessee, for fifteen hundred dollars, at any time during the existence of the lease. This was a *continual obligation running with the lease* on the part of the lessor, with the option in the tenant to accept the same or not, within that time. But, it seems, Wells, before the right of Hynson to make his election had determined, made sale of the property to Maughlin, and died. Maughlin, with notice of the recorded contract between the parties, can acquire no greater right than possessed by Wells." The certain and definite rule deducible from the authorities cited then is that if the covenant, as in this case, touches and concerns the land or estate demised, enhances the value thereof, and forms a part of the consideration for the acceptance of the lease by the lessee, a Court of equity will decree specific performance, not only as between the parties to the contract, but, in the absence of intervening equities controlling its conscience, also as between those claiming under them in privity of estate. 24 *Cyc.* 1026; *Gear on Landlord and Tenant*, Sec. 84; *Laffan v. Nagle*, 70 Am. Dec. 678; *Robinson v. Perry*, 68 Am. Dec. 455; *Kerr v. Day*, 53 Am. Dec. 526; *Hager v. Buck*, 8 Am. Rep. 368; *Spencer's Case*, 1 Smith's Leading Cases, 75.

(4) The remaining ground of the demurrer is that the covenant cannot be enforced because of the Rule against Perpetuities. The nearest approach to a correct definition of a perpetuity is found, this Court said in *Graham v. Whitridge*. 99 Md. 248, in *Lewis on Perpetuities*, and is as follows: "A future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest with-

in, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the person for the time being entitled to the property subject to the future limitations except with the concurrence of the individual interested under that limitation." In *Gray on Perpetuities*, Sec. 230 (2nd Ed.), the author says, that covenants for perpetual renewal are treated as an exception to the Rule against Perpetuities, but that it is "hardly necessary to create an exception to meet the case—the covenant to renew is a part of the lessee's present interest." And, in Sec. 230b, that "An option to a tenant for years to purchase a fee, exercisable at a remote time, is bad as violating the Rule against Perpetuities. * * * The only reason for considering the Rule against Perpetuities as inapplicable to such an option is the analogy to covenants for renewal treated in the two preceding sections. But the exemption from the Rule in the case covenants for renewal is either an exception which there is no reason to extend, or is to be explained, as it is in Sec. 230, on the ground that the covenant to renew is a part of the present interest, a ground which cannot well be taken when the present interest is a tenancy for years, and the interest to be purchased is a fee." While the statement of Mr. Gray, that the option to a tenant to purchase is bad, is supported by the authorities cited by the appellants, the distinction he makes between such an option and a covenant for renewal is not altogether satisfactory. The application of the Rule is not determined by the character of the estate or interest conveyed, but by the answer to the question, will it necessarily vest within the time fixed by the Rule? If the fee covenanted to be conveyed in the covenant under consideration is to be regarded as a future limitation, it may not of course necessarily vest under the terms of the covenant within the prescribed time. Likewise the estate to be conveyed to the lessee under the covenant for a renewal of the lease, at the option of the lessee, and upon payment of a fine, etc. If the covenant to renew is a part of the lessee's present interest, so is the covenant for a conveyance of the fee. The

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estate acquired under the new lease, while of the same character, is for a different term, and just as much a new and distinct estate as the estate acquired under the covenant for the conveyance of the fee. If the estate conveyed to the lessee, and the lessee's present interest, is, in the one case, not a term for ninety-nine years, but a term for ninety-nine years *with the right of renewal*, so, in the other case, the estate conveyed to the lessee, and the lessee's present interest, is not a definite term, but the term *coupled with the right to acquire the fee*. In this connection we may again refer to the statement in *Taylor's Landlord and Tenant, supra*, that "the grant of an additional term, or of a right to purchase is, for many purposes, to be considered a continuation of the former lease." But however this may be, our predecessors, in view of the fact that titles to property of great value in Baltimore City, and elsewhere in the State, are held under leases of the character of the one in this case (the forms of which, generally used, are suggested in *Latrobe's Justices' Practice*, pp. 463, 464 (7th Ed.), and *Carey's Forms and Precedents*, pp. 364-365), have somewhat relaxed the technical rules applicable to such estates, for the purpose of enforcing the contracts of the parties thereto. In *Banks v. Haskie*, 45 Md. 207, where a bill was filed for specific performance of a covenant for renewal in a lease for ninety-nine years, renewable forever, the Court in discussing the character of estates created by such leases said: "This character of tenure is, so far as we know among the States, peculiar to Maryland. It has not been generally adopted so far as we are informed in any other State. It was introduced here in colonial times, and has been a favorite system of tenure from a very early period. A large city has been built, and improved, and a vast majority of the real estate in Baltimore is now held under it. It is not open to any of the objections against perpetuities. Property is not thereby placed *extra commercium*. On the contrary, these leasehold interests devolve upon the personal representatives of the owner, are in terms made assignable, and they, as well as the ownerships in fee under the denomination of 'ground

rents,' are subjects of daily transfer, and are constantly sought for a safe investment of capital. It is a peculiar description of tenure which has been sustained by our Courts, and approved and fostered by our people. While the ground rents from their nature are usually of a fixed value, the leasehold interests are more or less fluctuating. In many, and indeed in most cases, they have largely increased in value with the growth of the city. And most extensive and costly improvements have been and are daily made by owners of such interests on grounds thus leased."

Again in the case of *Myers v. Silljacks*, 58 Md. 319, speaking of leases of this character, JUDGE ALVEY said: "We all know that estates dependent upon leases like the one before us are exceedingly common in this State, and particularly so in the City of Baltimore. Both the reversionary freehold and the leasehold estates are the subjects of daily transfers and assignments, and they constitute a considerable portion of the substantial wealth of the people. While the one estate is subject exclusively to the law that governs real property, the other is mainly controlled by the law that governs personalty; the one estate passing by descent, and being subject to the law of partition among heirs, while the other is the subject of administration, and is governed by the law that directs distribution of the personal estate. Both estates alike are the subjects of mortgage and judgment liens, and are constantly being sold and transferred in the enforcement of such charges. It is of the utmost importance, therefore, that the tenure be maintained with entire certainty; that the true relation of the parties to the property be at all times fully recognized, so that their exact rights may be known and enforced, and that third parties may know how to deal with respect to those rights." And again, in the case of *Worthington v. Lee*, *supra*, the Court said, that the above cases fully state the reasons why this Court "has applied a more liberal doctrine to these cases than that applied in the English Courts; and it has done so with special reference to the pecu-

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liar nature and condition of the local titles that exist in the City of Baltimore." Without detracting from the great weight and respect to which the authorities cited by appellants are justly entitled, we must adhere to the previous decisions of this Court, and hold that the lease in question did not place the property *extra commercium*, and that the rights of the parties under the covenants therein are "not open to any of the objections against perpetuities."

It follows from what we have said, that the decree of the Court below must be affirmed.

Decree affirmed, with costs and cause remanded.

Subsequently the following supplemental opinion was delivered by THOMAS, J.:

Since the filing of the opinion in this case our attention has been called to the agreement of counsel and the certificate of the Clerk of the Circuit Court of Baltimore City, filed in this Court on the day of the argument, whereby it appears that the petition and motion of Lee M. Hollander was set down for hearing by the plaintiff.

In the case of *Paul v. Nixon*, reported in a note to *Jones v. Magill*, 1 Bland, 177, CHANCELLOR HANSON said: "If indeed the defendant was entitled to have the case set down for final hearing, on bill and answer, it must be on terms similar to those of the complainant's setting down, viz, that everything contained in the bill is true, that is to say, the rule must be reversed. But there is no such practice." *Miller's Eq. Procedure*, p. 319, note 4.

Who is a non-resident, is a mixed question of law and fact. The petitioner states in his petition "That he has lately been in Scandinavia for a year and a half for the purpose of studying philology, and is now in the city of New York for the purpose of using libraries there situated, but that your petitioner has never abandoned his residence and citizenship in the State of Maryland." It therefore appears that he has been out of the State at least a year and a half. The peti-

tion does not say when he expects to return to Maryland, or whether he intends to return at any certain time, and it may be that he intends to remain out of the State indefinitely. If he has been out of the State for a year and a half with no intention of returning, "or with the intention of returning at some indefinite time in the future, as circumstances may dictate or permit," he is a non-resident within the meaning of Section 123 of Art. 16 of the Code, and may be proceeded against as such, notwithstanding he may not intend to abandon his domicile in this State, for, as was said in *Dorsey v. Kyle*, 30 Md. 512, "In contemplation of the attachment law, the domicile may be in this State, while the actual residence is in another." The term "non-resident" in Sec. 123 of Art. 16 of the Code, means a "person who doth not reside in this State," as defined in the law relating to attachment. *Dorsey v. Dorsey*, 30 Md. 531; *Miller's Eq. Procedure*, Sec. 123, p. 160.

In the case of *Dorsey v. Dorsey*, *supra*, the defendant stated in his petition that he left his home in Maryland to visit his wife, who was then sick at her father's in Winchester, Virginia, with the intention of returning in a few days, but owing to the position of the armies about Winchester and Harper's Ferry he was unable to do so and was forced to wait for the close of the Civil War, although at all times intending to return. While he was absent from the State he was proceeded against as a non-resident, and the Court held that he was a non-resident within the meaning of the provision of the Code.

In the case of *Riscwick v. Davis*, 19 Md. 82, in disposing of an exception to evidence offered to show the intention of the defendant to return to the State, at some indefinite time, the Court said: "Residence and domicile are sometime distinct things. In the matter of *Thompson*, 1 Wend. 43, it was decided that residence out of the State for the purpose of being subject to foreign attachment, did not import that domicile should be out of the State also. *Frost v. Breslin*, 19 Wend. 14. In *Haggart v. Morgan*, 1 Seldon, 428, the defend-

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ant offered to prove that, at the time of taking out the attachment, he was not a non-resident, but a resident of the City of New York, that he had been absent about three years, attending a law-suit at New Orleans, and returned in the spring of 1848; the judge excluded the evidence, on the ground that the offer itself showed the debtor to be a non-resident, within the spirit of the Act. In the case at bar, the defendant had been absent four or five years, and *non constat*, but he might be absent as many years longer. The evidence being foreign to the issue, should have been excluded."

Mr. Poe says: "It may be stated, as the result of the authorities, that where a citizen of this State, domiciled here, goes abroad on business or pleasure for a brief period, without any intention of abandoning or changing his domicile, and with a fixed purpose to return at a definite or specified time, retaining and intending to retain, in the meantime, both his domicile and political citizenship, he cannot properly be treated as a non-resident within the meaning of the attachment law, simply because of his temporary absence from his residence and home. Where, however, he leaves the State and remains absent for any considerable period, without any intention of returning, or with the intention of returning at some indefinite time in the future, as circumstances may dictate or permit, he will be liable to be proceeded against as a non-resident, notwithstanding he may not have acquired a fixed residence in any other State or country." 2 *Poe's P. & P.*, sec. 506 (3rd Ed.).

On the facts stated in the petition we think the plaintiff had a right to proceed against the petitioner as a non-resident, and that, therefore, there was no error in the order of the Court overruling the motion to quash the proceedings against him. As we have said, the plaintiff had no right to have the matter set down for hearing on the petition and answer, but as it appears he did so, we must assume that it was done with the petitioner's consent, and he, therefore, has no right to complain if the motion was properly disposed of on the facts stated in his petition.

HENRY HENLEY DODGE ET AL. vs. WILLIAM M. C.
DODGE.

Trusts and Trustees—Powers of Substituted Trustee—Renunciation of Trust by Heir of Surviving Trustee—Appointment of Non-Resident as Trustee—Exception to Ratification of Trustee's Sale—Unborn Remaindermen.

When a power of sale is given by will to testamentary trustees, and the survivor of them, and the heirs and assigns of the survivor, the power is annexed to the office of trustee, and may be exercised by a substituted trustee appointed upon the death of all of the testamentary trustees.

If various powers are given to a testamentary trustee, most of which are annexed to the office, but some of which give a personal discretion to the trustee, then a substituted trustee is authorized to execute those powers which are not personal in their nature.

When a will conveys an estate to trustees, and the survivor, and the heirs of the survivor, and upon the death of the surviving trustee, his heir unites in a suit asking for the appointment of a new trustee, that is in effect a renunciation or disclaimer of the trust by him.

A non-resident of the State may, in the discretion of the Court, be appointed a trustee to carry out the provisions of a will, upon the death of the testamentary trustee.

When a trustee's report of sale alleges that the sale was for the advantage of all the parties in interest, and was made with their consent, it is no ground of objection to the ratification of the sale that the report fails to allege, or that there was no evidence to show, that the sale would be to the advantage of unborn persons who might, if they came into being, have an interest in the proceeds of sale.

Decided December 9th, 1908.

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Appeal from the Circuit Court for Montgomery County
(HENDERSON, J.)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON and HENRY, JJ.

Edward C. Peter, for the appellant, submitted the cause on his brief.

Robert B. Peter, for the appellee.

HENRY, J., delivered the opinion of the Court.

This appeal brings up for consideration the question as to the right of Joseph H. Bradley, substituted trustee under the last will and testament of the late Henry Henley Dodge, to sell certain real estate of the testator lying in Montgomery County.

In the item of the will with which we are primarily concerned, the testator devises and bequeathes the residue of his estate to Ysidora B. M. Dodge, Maurice J. Adler, and Harrison Howell Dodge, all of the District of Columbia, "and the survivors and last survivor, and the heirs, executors, administrators and assigns of such last survivor, in trust, to have and to hold the same with full power according to their, his or her best judgment and discretion, to manage and direct the same, to sell and convey and deliver the same or any part thereof, according to the quality of said estate, to lease or encumber the same or any part thereof, with full power to invest the same or any part thereof, and to change investments, etc.," for the benefit of his children, etc.

Maurice J. Adler and Harrison Howell Dodge renounced the trust imposed by the will aforesaid, but Ysidora M. Dodge qualified as executor and trustee, and continued to act in both capacities until her death in February, 1904.

In December of that year, the appellees filed a bill of complaint in the Circuit Court for Montgomery County, to which

all the parties in interest under the aforementioned will were made parties, and which, after reciting the foregoing and other facts, stated that all parties desired the appointment of Joseph H. Bradley, of the District of Columbia, as trustee in the place of the said Ysidora M. Dodge, deceased, and praying that he, or some other suitable person or persons, be so appointed and be invested with all the rights and powers given to the trustees mentioned in the will.

In March, 1906, Mr. Bradley was appointed trustee, as prayed, and duly qualified by filing an approved bond. Shortly thereafter, he sold a valuable tract of land to the Chevy Chase Club, a corporation, which, after making a cash payment of \$5,000, filed objections to the ratification of the sale on the ground that the Court was without jurisdiction to appoint a trustee; that the said Bradley had no power to make said sale, and because the trust created by the will, upon the death of Ysidora M. Dodge, devolved upon one of the complainants in this suit, William M. C. Dodge, her eldest son and heir at law.

Notwithstanding such objections, the Court finally ratified and confirmed the sale on September 19th, 1908, overruling the exceptions filed. From the order of ratification, an appeal was entered to this Court.

It is contended by the appellants, in the first place, that the trust created by the will was personal in its nature and incapable of transmission to a trustee appointed by the Court.

This question has not infrequently been before this Court, which has uniformly held that it is purely a matter of intention, to be gathered from a consideration of the whole will and from the nature and objects of the trust created thereby, as to whether a trust is personal in its character or is annexed to the office of trustee. Among the latest decisions on the subject is that in *Snyder v. Safe Deposit & Trust Company*, 93 Md. 225, where the Court, speaking through JUDGE PEARCE, reviews several earlier decisions and clearly announces the rule on the subject. And in the case of *Safe Deposit & Trust Company v. Sutro*, 75 Md. 361, it was held that when the

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words heirs, administrators and executors, or words of similar import, were added to the designation of the trustee by name it had the effect of excluding the idea of a personal trust, inasmuch as it was impossible for a testator to know who the heirs, etc., of any person named as trustee by him might be. Applying this test to the will of Mr. Dodge, we find that in the section quoted, after the designation of the trustees by name, he adds, "and the survivors and last survivor, and the heirs, executors, administrators and assigns of such last survivor," and similar words are used in all other sections of the will, except two.

One of these exceptions is in the clause where the testator authorized the trustees to render assistance to such person as he may suggest in a letter to be addressed by him to them, "the character and amount of such assistance to be according to the judgment" of the said trustees, and the other exception is in the clause appointing the said trustees guardians for his infant children.

In both of these instances, the words, "heirs. etc.," are omitted after the designation of the trustees, while the nature of the duties imposed, particularly in the instance first cited, makes it apparent that the testator was creating a personal trust to be executed only in the discretion of the trustees actually named in the will. But the particularity with which the words "heirs, etc.," are added in other sections indicates a different purpose as to them; and, generally speaking, it may be said that, in the absence of a clearly expressed intent to the contrary, the power of sale conferred upon a trustee in a will is regarded as a ministerial duty, annexed to the office and passing to any person lawfully substituted in the place of the original trustee. It is contended in argument by the appellant that some, at least, of the trusts created by the will are personal and that the decree naming a new trustee is invalid in not making a distinction in this respect. Accepting the statement as a fact, we think that the decree is good *pro tanto*, though ineffectual in attempting to invest the substituted trus-

tee with those powers which, as above set forth, are of a personal nature.

It is further urged that upon the death of Ysidora M. Dodge, the trust descended upon her heir at law, under the provisions of Sec. 24, Art. 46, Code of Public General Laws. While this is true, the heir at law in this case is a party complainant in the suit, and this is in effect a renunciation of the trust. A disclaimer of a trust may be by acts and conduct, as well as by deed, though in this case it is one of the admitted facts that William M. C. Dodge, the heir at common law, conveyed the legal estate to the aforesaid Joseph H. Bradley, so that both by deed, as well as by conduct amounting to a disclaimer, the heir has renounced the trust, and there was a vacancy which the Court was called upon to fill. It is a rule in equity, which admits of no exception, that the Court never wants a trustee, and under its general powers, even if statutory authority were not given by Sec. 90 of Art. 16, Code of Public General Laws, it would have, under circumstances like those in the present case, power to appoint some suitable person to execute the trusts made in the will of the testator.

The objection is also made that Mr. Bradley, being a non-resident of the State, is ineligible to the office. The selection of a trustee is a matter in the discretion of the Court, and while it is a wise custom and the better practice to select a resident, yet there are circumstances which will justify a departure from the rule. The testator in this case was himself a resident of the District of Columbia, the original trustees appointed by the will were residents of the same District, the beneficiaries under the trust now reside there and all have united in a petition for the appointment of Mr. Bradley, while the larger part of the trust property is situated in Montgomery County in convenient proximity to the residence of the trustee, so that its management and supervision can be easily looked after by him. The recommendation of the parties in interest is always entitled to weight, and, in view of this and the other facts recited, we think the Court exercised a sound discretion in appointing Mr. Bradley to the vacant trustee-

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ship. *Story's Equity*, Vol. 2, Sec. 976; *A. & E. Encyc.*, Vol. 28, page 960; *Miller's Equity*, Sec. 315.

Another, and final, objection made in the appellant's brief is that the allegations in the trustee's report of sale should have been supported by proof, and that, inasmuch as it is possible for the trust to open to let in unborn persons, the report should have stated that the sale was to the advantage of such unborn *cestuis que trustent*. We do not think that either, under the circumstances, was necessary. Neither party asked for leave to take testimony and the allegations of the report were not disputed by the written exceptions filed, which merely raised some points of law upon admitted facts. It would be entirely speculative for the Court to hold that the interest of persons unborn would not be identical with those of the living *cestuis que trustent*. Every person *in esse*, having an interest in the trust, was made a party to the proceedings, and the report states, under affidavit, that such sale was to the advantage of all the parties and that it was made with the approval of the children of the testator. We think this sufficient, under the circumstances stated, to warrant the action of the Court in ratifying the sale.

Order affirmed, the costs to be paid out of the estate.

THE MONEYWEIGHT SCALE COMPANY *vs.* NELSON F. McCORMICK.

Malicious Prosecution — Sufficiency of Evidence — Probable Cause—Malice—Advice of Counsel—Embezzlement—Failure to Pay Over Money Collected—Evidence—Appeal—Harmless Errors.

In an action of malicious prosecution plaintiff's evidence showed that he was a sales agent of the defendant company and as such had collected for it sums of money, a part of which he did not pay over; that he communicated this fact to an agent of the defendant and said that the amount due would be paid from commissions to be earned by plaintiff, to which the agent did not object, and plaintiff continued to act as sales agent; that afterwards the defendant refused to render plaintiff a statement of the commissions he was entitled to receive; that the defendant caused plaintiff to be arrested and indicted for embezzlement, but did not tell the State's Attorney that plaintiff claimed that the defendant owed him certain commissions, and that the trial of the indictment resulted in the acquittal of the plaintiff. *Held*, that this evidence is legally sufficient to entitle plaintiff to recover, if found to be true by the jury, since it tends to show that the plaintiff's failure to pay over all the money collected by him was not with intent to defraud the defendant; that defendant knew that fact, and that plaintiff was not guilty of the crime charged.

In such action, evidence is admissible to show the nature and extent of the plaintiff's claim against the defendant and the manner in which the defendant had treated plaintiff's use of money collected by him and not paid over.

In an action of malicious prosecution, while malice may be presumed from the want of probable cause, such presumption may be rebutted by proof of the circumstances under which defendant acted, such as that, after full disclosure of all the

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facts to counsel, he acted in good faith upon the advice of counsel, and in the honest belief that the accusation made was well founded.

The absence of probable cause cannot be presumed from the fact that the defendant acted maliciously, and the plaintiff is not entitled to recover unless it be shown that the defendant acted without probable cause.

When the evidence in an action of malicious prosecution shows that the prosecution was begun by the express authority of the defendant, and that plaintiff was acquitted, it is proper to instruct the jury that if the arrest and prosecution of the plaintiff was procured under such circumstances as would not have induced a reasonable and dispassionate man to believe that the plaintiff was guilty of the charge against him, then there was no probable cause for the prosecution, and the jury may infer, in the absence of proof to the contrary, that the prosecution was malicious in law, and their verdict may be for the plaintiff.

When the defendant company, at the time of instituting the prosecution of the plaintiff for embezzlement in not paying over money collected by him, did not state to the State's Attorney's office that the plaintiff claimed to be entitled to certain commissions from the defendant, and that defendant had failed to comply with plaintiff's demand for a statement of account, the defendant is not entitled to have the jury instructed that, if before suing out the warrant for the arrest of the plaintiff, the defendant had placed the entire matter before the State's Attorney's office and was by it advised to swear out the warrant, then the verdict must be for the defendant.

The mere fact that an agent fails to pay over money collected by him does not constitute probable cause for procuring his arrest on the charge of embezzlement.

Whether there was probable cause for the prosecution of a party does not depend upon whether he was guilty or not of the crime charged.

When the defendant caused plaintiff to be arrested for embezzlement, the fact that the defendant charged the money embez-

zled against the plaintiff as a debt does not negative the existence of probable cause.

The question as to the existence of probable cause for a prosecution depends upon whether or not all of the facts of the case are such as would have justified a cautious man in believing that the accused was guilty.

Evidence that plaintiff's counsel had stated in a conversation that there was not a jury in the country that would decide in a certain way, is immaterial, and cannot be complained of by the appellant as constituting reversible error.

When evidence has been admitted subject to exception, the appellant cannot avail himself of the exception on appeal unless there was a subsequent motion to strike out the evidence.

In an action for malicious prosecution, when the declaration does not allege special damage, the plaintiff should not be allowed to testify that he was not able to do as much work after his imprisonment as before, could not sleep, etc. But the admission of such evidence is not reversible error when not followed up by other evidence of a similar character, when the imprisonment of the plaintiff was only from Saturday evening to the following Monday, and when the verdict of the jury was for a small amount and they had been properly instructed as to the measure of damages.

Decided January 12th, 1909.

Appeal from the Superior Court of Baltimore (NILES, J.).

Plaintiff's 1st Prayer as Modified.—If the jury shall find from the evidence that the plaintiff was arrested and imprisoned, as set forth in the police records of Baltimore City, read in evidence, and afterwards was indicted, tried and acquitted in the Criminal Court of Baltimore City on the charge of embezzlement, as set forth in the records of that Court and the docket entries and original papers therein, read in evidence, and shall find that the defendants, Howard C. Shimer, James O. Winsted and Isaiah P. Blackburn, and the

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defendant, The Moneyweight Scale Company, a corporation organized under the laws of the State of Illinois, by its officers, agents, attorneys and servants, acting within the scope of their employment by said defendant corporation, or acting by the authority of the said defendant corporation, expressly given for such act, aided and assisted in procuring the arrest and prosecution of the plaintiff under such circumstances as would not have induced a reasonable and dispassionate man to have believed the plaintiff guilty of the charge made against him; or if the jury shall find that defendant corporation ratified and adopted said action of its officers, agents, attorneys and servants, after said officers, agents, attorneys and servants had aided and assisted in procuring said arrest and prosecution of the plaintiff under such circumstances as would not have induced a reasonable and dispassionate man to have believed the plaintiff guilty of the offense so charged, then there was no probable cause for said prosecution, and the jury may infer, in the absence of sufficient proof to satisfy them to the contrary, that said prosecution was malicious in law, and their verdict may be for the plaintiff. (*Granted.*)

Plaintiff's 2nd Prayer.—If the jury shall find from the evidence that the plaintiff was arrested and imprisoned, as set forth in the police records of Baltimore City, read in evidence, and afterwards was indicted, tried and acquitted in the Criminal Court of Baltimore City on the charge of embezzlement, as set forth in the records of that Court and the docket entries and original papers therein, read in evidence, and shall find that the defendant, Isaiah P. Blackburn, was the agent of the defendant corporation, the Moneyweight Scale Company, and that the scope of his employment as such agent included the collection of debts due said corporation, with full authority as to the mode of procedure to be employed for that purpose and to employ counsel for that purpose, and shall find that said Isaiah P. Blackburn did employ the defendant, Howard C. Shimer, in the criminal prose-

cution of the plaintiff, if they find said criminal prosecution; and shall find that said defendants, Blackburn and Shimer, aided and assisted in procuring the arrest and prosecution of the plaintiff, and the said defendant, James O. Winsted, aided and assisted therein, for the purpose of collecting an alleged indebtedness due by the plaintiff to the defendant corporation, or for any other object than the vindication of public justice, under such circumstances as would not have induced a reasonable and dispassionate man to have undertaken such prosecution for public motives, then said prosecution was malicious in law, and if the jury shall also find lack of probable cause, as defined in defendants' fifth prayer, their verdict may be for the plaintiff. (*Granted.*)

Plaintiff's 3rd Prayer.—If the jury shall find a verdict for the plaintiff, they are at liberty to take into consideration all the circumstances of the case and award such damages as will not only compensate the plaintiff for the wrong and indignity he has sustained in consequence of the wrongful acts of the defendants, but may also award exemplary or punitive damages as a punishment to the defendants for such wrongful acts. (*Granted.*)

Defendants' 8th Prayer as Modified.—If the jury find from the evidence that the defendants consulted the State's Attorney's office of Baltimore City before swearing out the warrant for the arrest of the plaintiff, and that they placed the entire matter before the State's Attorney's office, and that they were advised by the State's Attorney's office to swear out the warrant for the arrest of the plaintiff, they are at liberty to consider these facts in deciding whether or not the defendants are chargeable with malice. (*Granted.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and HENRY, JJ.

H. Carhart Shimer, for the appellant.

Andrew C. Trippe (with whom was *James McC. Trippe* on the brief), for the appellee.

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THOMAS, J., delivered the opinion of the Court.

This is an action for malicious prosecution and for false imprisonment (which was tried as for malicious prosecution), by the appellee, Nelson F. McCormick, against the appellant, the Moneyweight Scale Company, a corporation of the State of Illinois, and Howard C. Shimer, James O. Winstead and I. T. Blackburn. The trial below resulted in a verdict and judgment in favor of the appellee against the appellant for \$425.00, and a verdict and judgment in favor of the other defendants, and it is from the judgment against the appellant that this appeal is taken. The record contains ten bills of exception, the first nine of which are to the rulings of the Court on the evidence, and the tenth to the action of the Court on the prayers. As the defendants by their first prayer, which was rejected, asked the Court to instruct the jury that the plaintiff had offered no evidence legally sufficient to entitle him to recover, it will be necessary to examine the evidence at some length.

It appears from the testimony of the appellee that the appellant was engaged in the business of selling scales, and that he was employed by the appellant from February, 1902, to February, 1906, as its "salesman and collector" in Baltimore City. That after the fire in Baltimore, in 1904, business was very dull, and that in order to get business it was necessary for him to have a team to take around his samples and to deliver the goods, and that he used some of the collections he had made, and which had not been turned into the appellant company, for the purpose of securing the team. That in the latter part of 1904 he met Mr. Winstead, General Manager of the appellant for the Eastern States, including Baltimore City, whose office was in Philadelphia, and Mr. Klein, one of the officials of the appellant, at the Hotel Shirley, in Baltimore, and that Mr. Winstead wanted him to go to Philadelphia and act as collector for the company there. That in April, 1905, Mr. Winstead again asked him to go to Philadelphia, and that the appellee then told him that he had used some of the collections for the purpose of securing the team,

and that he wanted to straighten up before he made any changes; and that that was the reason he had not consented to go to Philadelphia when he first asked him to go; that Mr. Winstead then asked him how much he had so used, and that he told him, and that Mr. Winstead then asked him how his collections were, and he told him they were fairly good, and that Mr. Winstead then told him to use the collections he had to pay up those he had not turned in to the appellant, and to go ahead and "use the best efforts" he could to get business and that he would see him through, and that he did just as Mr. Winstead told him to do. That when Mr. Winstead was in Baltimore, he and the appellee used the team together in making sales and collections for the appellant. That in October, 1905, Mr. Winstead wrote him, expressing the hope that he would continue to get "nice business," as "I am desirous that you have the success that you so much deserve," and, on October 23, 1905, wrote him again, urging him to come to Philadelphia, and stating that there was no business in Baltimore, and that the sooner he got to Philadelphia the better it would be for him, and requesting him to box up the scales he had in his possession and ship them to Philadelphia. That he went to Philadelphia to work for the appellant some time in November, 1905, and that shortly after he got there, about the first of December, he had a talk with Mr. Winstead and Mr. Blackburn, a representative of the appellant, in regard to the amounts he had collected and used, and gave them an account of it; that they wanted him to settle the amount at once, but he told them that he "was not in a position to settle just then;" that Mr. Blackburn wanted him to get his brother to fix it up for him, and that he told him that he did not care to do that; that he, appellee, had some money in the hands of Mr. Winstead, and that he would like to have some time to pay what he had used, and that they finally agreed to let him keep on as he had been, "and pay it along out of his commissions." That a short time after this conversation, on December 13th, he was injured by a trolley car, and was laid

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up for about ten weeks, and that after he got out again Mr. Winstead advised him to go back to Baltimore. That he returned to Baltimore, and after he had been working there about a week Mr. Winstead and the appellant refused to furnish him with any more samples.

After the appellee was discharged, in February, 1906, the appellant wrote appellee's brother that after appellant had discovered the shortage of the appellee the appellant had agreed that the appellee could liquidate it in the way of commissions, but that appellee had failed to do this, and urging his brother to take some steps towards having it paid. To this letter appellee's brother replied that he believed the appellee to be honest, and that if the appellant would allow the appellee to continue his work he was certain he would pay every dollar he owed; that he had spoken to the appellee about the matter, and that he said that while he owed the appellant about \$170.00, he had an open account against the appellant, and requested the appellant to send him an itemized account, in order that he could know how the appellee stood. On April 4, 1906, appellant wrote appellee's brother in reply that they would be glad to accommodate him with an itemized statement of appellee's account, but that that would involve a large amount of work, and that they could not just then furnish it. That they were very glad to quote the present balance, so that he could know the general shape his account was in. That their commission account with him to that date showed him indebted to the appellant to the amount of \$271.40, against which there were credits of a conditional nature in favor of the appellee, in the form of prospective commissions, to the amount of \$342.00, and that in addition to the \$342.00, there was a further sum of \$62.50 in possible commissions, but that the several amounts making up the \$62.50 were in dispute, and the payment of the same quite doubtful. In this letter the appellant requested appellee's brother to notify the appellee that the appellant had a perfect right to resort to extreme measures if the matter was not adjusted, and that he could not expect the appellant to withhold such action much longer. On

the 11th of April, 1906, the appellant wrote the appellee as follows: "This is to give you notice that on Saturday, April 21st, we are going to forward our claim against you to our Baltimore attorney and direct him to institute immediate action. * * * We shall not engage in this action in any vindictive or revengeful spirit, but merely for the purpose of enforcing a proper adjustment, etc."

Appellee further testified that at the time he was discharged he owed the appellant about \$168.00, and that in addition to his commissions on sales made by him, which the appellant had refused to render him an account of, he was entitled to commissions on the sales of twenty-two scales, made by him and Mr. Winstead in Baltimore with the understanding that they would divide commissions. Some time after the appellant's letter to the appellee, of April 11th, appellee received a note from Mr. Shimer, counsel for the appellant, asking him to call at his office on business of importance, and appellee states that when he went to Mr. Shimer's office Mr. Shimer told him that he had appellant's account against him for \$300.00, which he wanted him to settle at once. That he told Mr. Shimer that it was not \$300.00, but \$168.00, and that he was ready and willing to settle with the appellant if the appellant would render him a statement, and it appeared from the statement that he owed the appellant anything; that Mr. Shimer said to him that Mr. Blackburn would be in Baltimore in a few days and if it was not settled before he came he would make trouble for him, and that when he asked him what he meant by trouble, Mr. Shimer said that he would have him arrested. That appellee and his counsel later on had another interview with Mr. Shimer, when Mr. Winstead and Mr. Blackburn were present, and that at that interview he again demanded a statement from the appellant of his commissions, which they refused to give him.

The testimony of Mr. Winstead, Mr. Blackburn and Mr. Shimer is to the effect that the appellee admitted to Mr. Winstead in May, 1905, that he was short in his accounts to the extent of about \$100.00; that he was at that time in great dis-

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tress of mind for fear that the appellant would find it out; that Mr. Winstead, after thinking the matter over, agreed to let him continue his work of selling and collecting for the appellant, and to work with him; that Mr. Winstead subsequently found that appellee was short about \$300.00, instead of \$100.00, and that he and Mr. Blackburn had a talk with the appellee in Philadelphia, in which conversation appellee was told that his shortage amounted to \$300.00; that the appellee disputed the correctness of that amount, and signed a statement admitting items which he had collected amounting to \$169.00, and also another statement of items amounting to \$91.50, which he claimed to have accounted for to the former general manager of the appellant. That Mr. Winstead consulted Mr. Shimer, counsel for the appellant, in regard to the claim against the appellee, and that afterwards he, Mr. Blackburn, and Mr. Shimer went to the State's Attorney's office in Baltimore City, and consulted Mr. O'Dunne, and that, acting upon the advice of counsel and of the State's Attorney, the prosecution was begun by direction of the appellant; that in consulting Mr. O'Dunne they did not tell him that the appellee claimed that the appellant owed him commissions and had refused to render him a statement.

The agreement of counsel, made a part of the record, shows that the appellee was arrested on the 29th of September, 1906, on a warrant sworn out by Mr. Shimer, "acting by express authority" of the appellant, "charging him with violating Article 27, Sec. 103, of the Code of Public General Laws of the State of Maryland, and with the embezzlement of \$169.00, current money, belonging to the Moneyweight Scale Company;" that the appellee on the testimony of Mr. Shimer, acting for the appellant, was committed to the Baltimore City Jail for the action of the Grand Jury for Baltimore City, and upon the testimony of said Shimer was indicted by the Grand Jury, and tried in the Criminal Court of Baltimore City upon said charge; that the appellant "aided and assisted in the prosecution of said trial," which resulted in the acquittal of the appellee.

To entitle the plaintiff to recover in an action for malicious prosecution, he must show that he was prosecuted by the defendant for an alleged criminal offense; that the charge was false and malicious, and without probable cause, and that the prosecution was finally determined by an abandonment or a dismissal of the charge, or the acquittal of the accused. His failure to establish any one of these essential elements will be fatal to his right of recovery. The falsity of the charge may be shown by the trial and acquittal of the plaintiff, but such evidence is not conclusive, and the defendant may show that, notwithstanding his acquittal, the plaintiff is guilty of the offense for which he was prosecuted. The malice which is required to be shown is the wrongful motive that prompted the prosecution, and may be established by proof of any motive other than that of bringing a guilty party to justice. While malice may be presumed from the want of probable cause, such presumption may be rebutted by proof of the circumstances under which the defendant acted, for instance, that he consulted counsel, and that, after a full and frank disclosure of all facts known to him, or which, by the exercise of reasonable diligence, he could have ascertained, he in *good faith*, and in the honest belief that the accusation was well founded, acted upon the advice of his counsel. Probable cause, the absence of which warrants the presumption of malice, is said to be "such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man in believing the party accused to be guilty." The absence of probable cause cannot be presumed from the fact that the defendant acted maliciously, and unless the plaintiff shows that the defendant acted without probable cause he cannot recover. 1 *Poe's P. & P.*, secs. 192-197 (3rd Ed.); *Turner v. Walker*, 3 G. & J. 377; *Cecil v. Clark*, 17 Md. 508; *Boyd v. Cross*, 35 Md. 196; *Straus v. Young*, 36 Md. 246; *Cooper v. Utterback*, 37 Md. 282; *Stansbury v. Fogle*, 37 Md. 369; *Thelin v. Dorsey*, 59 Md. 539; *Hyde v. Greuch*, 62 Md. 577; *Torsch v. Dell*, 88 Md. 459; 26 *Cyc.* 49, note 58.

The plaintiff was charged with having fraudulently embez-

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zled \$169.00, current money, belonging to the appellant, and in support of such charge, it was necessary to show that he received and failed to pay the money with *intent to defraud* the appellant. 15 *Cyc.*, p. 491 and p. 533, note 64. In the case of *McElroy v. People*, 66 N. E. Rep. 1058, where the prisoner had been tried and convicted of the crime of embezzlement, the Supreme Court of Illinois said: "We are also of the opinion that the evidence failed to prove with that degree of certainty required by the rules of evidence in criminal cases that the defendant fraudulently converted to her own use, or took and secreted with intent so to do, without the consent of her employer, the money in question. The only evidence of a criminal intent is the inference to be drawn from the act itself. She at no time denied or attempted to conceal the indebtedness. In answer to the letters of Hubbard she went several times to his office for an accounting, and explained to him how she came to use the money, promising to pay it as soon as she could mortgage some property, or otherwise procure the amount. He caused her arrest, and then directed the officer to let her go upon her promise to raise the money within a given time. Two months later he again had her arrested, because, as he said, she had not lived up to her agreement in regard to paying the money. While she was not justifiable in using money belonging to her employer, it does not follow that she was guilty of the crime of embezzlement. The criminal law cannot be properly used by individuals to enforce the payment of debts, and that seems to have been the motive of the prosecuting witness in putting this prosecution upon foot."

We think it clear from the above recital of the evidence, that there was sufficient evidence in the case, if believed by the jury, to justify a finding, not only that the appellee was innocent of the crime for which he was prosecuted, but that the appellant *knew* that he did not intend to *defraud* it, and that, instead of acting in good faith upon the advice of counsel and the State's Attorney to whom it had made a full and frank disclosure of all the facts and circumstances within its knowl-

edge, and in the honest belief in the guilt of the accused, the appellant wrongfully resorted to the prosecution of the appellee for the purpose of enforcing the payment of a debt, which he had refused to pay because of its refusal to render him an account of the commissions he was entitled to receive, and that therefore the defendants' first prayer was properly rejected.

We find no objection to the plaintiff's first and second prayers as modified, and plaintiff's third prayer, which were granted by the Court below. The evidence shows that the prosecution was begun by the express authority of the appellant, and, so far as the appellant is concerned, they substantially conform to the instructions approved by this Court in *Torsch v. Dell*, *supra*. There was no reversible error in the refusal of the Court to grant the defendants' second, eighth, ninth, tenth and twelfth prayers. So far as they contain instructions to which the appellant was entitled, they are covered by defendants' third, fifth and modified eighth, ninth and tenth prayers, granted by the Court. As we have seen, the undisputed evidence in the case is that the agents of the appellant did not place "the entire matter before the State's Attorney's office," and defendants' eighth prayer was for that reason, without regard to other defects, properly rejected.

Defendants asked the Court, by their fourth prayer, to instruct the jury that if they found that the plaintiff collected funds belonging to the appellant and failed to account for the same, and that he appropriated said funds to his own use, then their verdict should be for the defendants; and, by their sixth prayer, that if the jury believed from the evidence that the plaintiff collected money belonging to the appellant and failed to account for the same to the appellant or its duly authorized representatives, "as set forth in the warrant," then the appellant had probable cause for procuring the arrest of the plaintiff on the charge of embezzlement, and their verdict should be for the defendants. These prayers were rejected, and the Court, by the modified sixth prayer, instructed the jury that the uncontradicted evidence in the case showed that the plaintiff collected moneys belonging to the defendant com-

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pany and failed to account for the same, and that the defendants had probable cause for procuring the arrest of the plaintiff on the charge of embezzlement, and that they should find for the defendants, unless they further found "that the duly authorized agents of the said defendant, with substantially the same knowledge as to the receipt of said defendant's money without accounting therefor, as was possessed by the defendants when the warrant mentioned in the case was sworn out, agreed with the plaintiff that whatever shortages were found to exist in his account with said defendant corporation should be charged against the plaintiff as an ordinary debt." It appears from the agreement of counsel, already referred to, that the warrant sworn out by Mr. Shimer charged the appellee with the fraudulent embezzlement of \$169.00 belonging to the appellant, and if the instruction granted by the Court could be construed to mean that notwithstanding the jury found that the plaintiff was guilty of the charge contained in the warrant, yet if they further found that the appellant agreed that the money embezzled by him should be charged against him as a debt, then their verdict should be for the defendants, it would be clearly wrong, for while the question of probable cause does not depend upon the guilt or innocence of the accused, if he was in fact guilty, no subsequent agreement could have changed the character of his act, so as to enable him to maintain an action for malicious prosecution. On the other hand, he may be innocent, and yet there may have been probable cause for his prosecution, and where there is probable cause there can be no recovery, however malicious the prosecution. As we have said, to sustain the action there must be both malice and a want of probable cause. Moreover, a party has a right to recover as a debt money obtained from him by fraud or embezzlement, and the fact that he charged the money so obtained against the accused as a debt, where probable cause is shown to have existed, would not of itself negative the existence of probable cause. 1 *Poe's P. & P.*, Sec. 194; 26 *Cyc.*, pp. 26 and 37; *Fagin v. Knox*, 66 N. Y. Rep. 525. In the case of *Rankin v. Crane*, 104 Mich. 6, the Court said, that

probable cause "being established, the motive of the prosecutor is immaterial, and the fact that the defendants offered to refrain from criminal prosecution if the plaintiff would repay the money he had misappropriated, is not sufficient to establish want of probable cause."

The question of probable cause does, however, depend upon whether or not *all* of the facts and circumstances were such as justified the belief of a cautious man in the guilt of the accused, and if the fact that a party received and failed to account for money, when taken in connection with all other facts and circumstances known to the prosecutor, were not such as warranted the belief of a prudent man in the guilt of the accused, and he therefore treated the money so received and not accounted for as an *ordinary* debt, there was not probable cause.

By the fifth prayer the jury were properly instructed as to what facts constituted probable cause, and were told that if they found that there was probable cause the plaintiff could not recover, and what the learned Court meant by the modified sixth prayer was, that while the fact that the plaintiff received and failed to account for the money belonging to the appellant, *standing alone*, was sufficient to justify the belief of the defendants in his guilt, if they found that, when taken in connection with all other facts and circumstances known to the defendants at the time of the prosecution, it did not justify their belief in his guilt, and that the defendants therefore treated the money so retained by him as an ordinary debt, then they were not to treat the fact of the plaintiff having received and failed to account for the money, standing alone, as sufficient to constitute probable cause.

This construction of the prayer leaves no ground for objection on the part of the appellant, and we think, in view of the other instructions granted, that the jury must have so understood it.

We find no error in the rulings of the Court in the second, third, eighth and ninth exceptions. The appellee had a right to show the nature and extent of his claim against the appel-

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lant, and how the appellant treated and regarded his use of the money which it subsequently charged him with having embezzled, as reflecting not only upon his own conduct, but the question of the good faith of the appellant. The evidence excepted to in the first exception, viz: that Mr. Trippe said "there wasn't a jury in the country that would decide the way Mr. Blackburn said," was immaterial and could not have prejudiced the appellant. It does not appear from the record that the question objected to in the fifth exception was answered by the witness, and the evidence in the sixth exception was taken subject to exception, and there was no motion afterwards to strike it out, while the record shows that the evidence referred to in the seventh exception was excepted to by the plaintiff and not by the defendant. If the question excepted to is not answered, the party excepting is not injured, and where evidence is admitted subject to exception, and there is no motion to strike it out, the party excepting cannot get the benefit of his exception in this Court. *Lawson v. Price*, 45 Md. 123; *Roberts v. Bonaparte*, 73 Md. 191.

The evidence referred to in the fourth exception was not admissible. The nar. does not allege special damages, and the plaintiff in his proof should have been confined to such damages as necessarily resulted from the facts alleged, and should not have been allowed to show, under the circumstances, that he was not able to do as much work after his imprisonment as he could do before, and could not sleep, etc. 1 *Poe's P. & P.* Sec. 584; *Ellicott v. Lamborne*, 2 Md. 136; *McTavish v. Carroll*, 13 Md. 429; *Webster v. Woolford*, 81 Md. 329.

But this evidence was not followed up by evidence showing that his inability to work, and his not being able to sleep, were due to his confinement in jail from Saturday evening to the following Monday, and the improbability of such results from so short an imprisonment, under the circumstances disclosed by the evidence, and the fact that the verdict in his favor was for only \$425.00, would indicate that the jury, who had been properly instructed as to the measure of damages, did not take such evidence in consideration in reaching their verdict, and

that the appellant was not injured by its improper admission, and we would not therefore be justified in reversing the judgment on account of such error. *B. & O. R. R. Co. v. State, use of Hauer*, 60 Md. 459.

We will affirm the judgment below.

Judgment affirmed with costs.

THE CONSOLIDATED GAS ELECTRIC LIGHT AND
POWER CO. *vs.* THE STATE OF MARYLAND,
FOR THE USE OF MARY O. SMITH,
WIDOW, AND HARRY E. SMITH,
INFANT.

Discretion of Trial Court in Cross-Examination of Witness—Evidence—Inferences Drawn by Witness from Facts—Preliminary Proof of Correctness of Photograph — Injury to Lineman by Contact with Electric Wire Where Insulation Had Been Cut—Evidence as to Replacing Insulation—Opinion of Witness as to Reason for Cutting Insulation—Custom of Linemen as to Use of Rubber Gloves—Evidence of Experiment as to Visibility of Defect in Wire—Evidence as to Financial Resources of Plaintiff Inadmissible in an Action for Negligence Causing Death—Non-Reversible Error of Trial Court—Question of Contributory Negligence for Jury—Sufficiency of Evidence of Electric Company's Negligence—Prayer as to Scintilla of Evidence.

The trial Court has a large degree of discretion as to allowing, or refusing to allow, a witness to be asked on cross-examination questions which are not clearly connected with his testimony on direct examination, especially when the questions

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relate to matters which can be proved by other witnesses, or by that witness himself if called by the cross-examining party. In an action for an injury caused by a defectively insulated electric wire, witnesses cannot be asked to state their inferences, based on facts proved, as to the knowledge possessed by the injured party as to the danger of such wires.

Photographs of the place where the accident happened which is the cause of action are admissible in evidence when shown to be correct representations, but the testimony of the photographer himself is not necessary. The preliminary evidence as to the correctness of the photographs is addressed to the discretion of the trial Court and from its determination in the premises no appeal lies unless there be a plain abuse of the discretion.

Plaintiff's deceased while at work on a telegraph pole was killed by contact with an electric wire of the defendant company from which the insulation had been removed. It was shown that the insulation had not been worn off by time or exposure, but had been clearly cut on that and adjacent wires, and also that electric companies test their high current wires from time to time, and that in so doing it is necessary to bare the wire at the point of testing. *Held*, that evidence is admissible to show that the wire with which the deceased came in contact and the adjacent wires were re-covered or re-taped by the defendant after the accident. Such evidence is not in conflict with the rule excluding evidence of repairs made after the happening of the injury.

If persons engaged in a particular business habitually act in a certain way without injurious results, that is evidence to show that one who acted in that way at the time of suffering an injury was not negligent. Consequently, in an action to recover damages for the death of a lineman of a telegraph company caused by his touching the defectively insulated wire of an electric company, strung on the same pole as the wires of the telegraph company, evidence is admissible to show that it was not customary for the linemen of the telegraph company to wear rubber gloves while stringing wires on poles, except in rainy weather.

When it is shown that plaintiff's deceased was killed by contact with an electric light wire at a point where the insulation had

been sharply cut away, the foreman of a telegraph company, of many years' experience, may testify that, in his opinion, the wire had been cut for the purpose of locating trouble and testing.

A telegraph lineman, while at work on a pole, was killed by touching the uninsulated wire of an electric company strung on the pole. A witness who placed himself in the exact position of the lineman at the time of receiving the shock, testified that from that position, the deceased could not have seen the bare place on the electric wire, because certain heavy gauge wires were between the line of vision and the electric wire. *Held*, that this evidence is admissible, being the result of an experiment to ascertain as a fact, and not as an opinion, whether the range of vision of the deceased was obstructed or not.

In an action by the widow and infant child of a man to recover damages for the defendant's negligence which caused his death, evidence is not admissible to show that the plaintiffs have no property or means of support. When such evidence has been improperly admitted, but it is apparent from a comparison of the amount of the verdict and the amount earned by the deceased in his lifetime, that the defendant was not injured by the admission of such evidence, it is not reversible error.

In an action against an electric company for an injury caused by its defective wire which was strung on the same pole with the wires of a telegraph company, when there is no evidence that the telegraph company could be held liable as a joint wrongdoer, the plaintiff cannot be asked on cross-examination if she had not made a bargain with the telegraph company to sue only the electric company. Such a question is only calculated to mislead the jury as to the issue in the case, which is negligence *vel non* of the defendant.

When a witness for the defendant has testified that the insulation on a wire was in good condition two weeks before the injury was caused, evidence is admissible in rebuttal to show that shortly before the time referred to by this witness the insulation of the wire was broken off.

A lineman of a telegraph company while at work stringing a wire on a pole, used also by an electric company, was killed

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by contact with a defectively insulated electric wire. In an action to recover damages for his death, the questions whether he was guilty of contributory negligence in not seeing the defect in the insulation, or in not using rubber gloves, or in his manner of work, are properly left to the jury where there is no evidence that the bare place on the wire could have been seen from the ground, and there is evidence that it could not have been seen from his position after climbing to his place of work on the pole, and evidence that under the conditions existing at the time of the accident, it was not customary for telegraph linemen to wear rubber gloves, and also evidence that the method used by the deceased to string the wire was the one usually employed for that purpose.

If it be shown that the insulation on defendant's electric wire was cut away at the point where the injury was caused, and that such condition existed two weeks before the happening of the injury, that is legally sufficient evidence of defendant's negligence to go to the jury, for if the cutting was not done by the defendant for the purpose of testing the wire, but by third parties, the lapse of time was sufficient to give constructive notice to the defendant of the condition of the wire.

When the evidence of defendant's negligence is sufficient to be submitted to the finding of the jury, it is not proper to instruct them that a mere scintilla of evidence to show defendant's failure to use due care is not sufficient to justify a verdict for the plaintiff. The Court cannot submit the case to the jury unless there is more than a scintilla of such evidence, and consequently, when the case is submitted, it cannot tell the jury to find for the defendant if there is only a scintilla.

Decided January 13th, 1909.

Appeal from the Baltimore City Court (SHARP, J.).

Plaintiff's 1st Prayer.—If the jury find from the evidence that the defendant Company owned and maintained a certain insulated wire carrying electrical current of high voltage which said wire was fastened to and supported by a cross-arm of a certain pole located in the bed of Guilford Ave.,

north of Eager Street, in the City of Baltimore and if the jury further find that the said pole was jointly used by the defendant and by the Western Union Telegraph Company; and if the jury further find that Harry H. Smith, the husband of the equitable plaintiff, was employed by the said Western Union Telegraph Company as a telegraph lineman and that in the course of his duties in such employment it became necessary for him to ascend the said telegraph pole, and to come into close proximity or contact with the said wire owned by the Defendant; and if the jury further find that the insulation on the said wire, at the time of the happening of the events which are the subject of this suit, was defective, because of the negligence of the defendant, so as to make the said wire a source of danger to persons coming into close proximity or contact with the same; and if the jury further find that while the said Harry H. Smith was so engaged in his duties and exercising such reasonable care as might be expected of a reasonably prudent man under the circumstances, he came into contact with said wire and received the injuries from which he died then the verdict of the jury should be for the plaintiff. (*Granted.*)

Plaintiff's 2nd Prayer.—If the jury find from the evidence that the defendant Company owned and maintained a certain insulated wire carrying electrical current of high voltage which said wire was fastened to and supported by a cross-arm of a certain pole located in the bed of Guilford Ave., north of Eager Street, in the City of Baltimore and if the jury further find that the said pole was jointly used by the defendant and by the Western Union Telegraph Company; and if the jury further find that Harry H. Smith, the husband of the equitable plaintiff, was employed by the said Western Union Telegraph Company as a telegraph lineman and that in the course of his duties in such employment it became necessary for him to ascend the said telegraph pole, and come into close proximity or contact with the said wire owned by the defendant; and if the jury further find that the said defendant had, prior to the time of the happening

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of the events which are the subject of this suit, caused certain cuts to be made in the insulation of said wire at or near the point where the same was fastened to said cross-arm of said pole for the purpose of making tests or for some other purpose, and that said defendant had negligently allowed the said cut places in said insulation to remain bare and uncovered so as to make the said wire a source of danger to persons coming into close proximity or contact with said bare and uncovered portions thereof; and if the jury further find that while the said Harry H. Smith was so engaged in his duties and exercising such reasonable care as might be expected of a reasonably prudent man under the circumstances, he came into contact with said bare and uncovered portions of said wire and received the injuries from which he died, then the verdict of the jury should be for the Plaintiff. (*Granted.*)

Plaintiff's 3rd Prayer.—If the jury find from the evidence that the defendant Company owned and maintained a certain insulated wire carrying electrical current of high voltage which said wire was fastened to and supported by a cross-arm of a certain pole located in the bed of Guilford Ave., north of Eager Street, in the City of Baltimore and if the jury further find that the said pole was jointly used by the defendant and by the Western Union Telegraph Company; and if the jury further find that Harry H. Smith, the husband of the equitable plaintiff, was employed by the said Western Union Telegraph Company as a telegraph lineman and that in the course of his duties in such employment it became necessary for him to ascend the said telegraph pole, and to come into close proximity or contact with the said wire owned by the defendant; and if the jury further find that the insulation on the said wire, at the time of the happening of the events which are the subject of this suit, was defective, so as to make this said wire a source of danger to persons coming into close proximity or contact with the same; and that the defendant knew, or by the exercise of due care ought to have known of such defect; and if the jury further find that while the said Harry H. Smith was so engaged in

his duties and exercising such reasonable care as might be expected of a reasonably prudent man under the circumstances, he came into contact with said wire and received the injuries from which he died, then the verdict of the jury should be for the plaintiff. (*Granted.*)

Plaintiff's 4th Prayer.—The Court instructs the jury that if they find for the plaintiffs, then in assessing the damages they are to estimate the reasonable probability of the life of the deceased, Harry H. Smith, and give his widow, Mary O. Smith, and his child, Harry E. Smith, the equitable plaintiffs, such pecuniary damages not only for past losses but for such prospective damages as the jury may find that they have suffered or will suffer as a direct consequence of the death of said Harry H. Smith, and in estimating the pecuniary loss or prospective damages sustained by the widow they are to take into consideration her age and health and the probable duration of her life, and in estimating the pecuniary loss or prospective damages sustained by the said child, the jury are to take into consideration its age and condition in life and what it could have reasonably expected to have received from the deceased for its support and education up to the time of its attaining 21 years of age, the verdict to be apportioned between the said widow and child in such amounts as to the jury may seem right and proper. (*Granted.*)

Defendant's 3rd Prayer.—That as it appears from the contradicted evidence of the plaintiffs' own witness that the insulation on the wires of the defendant was not out of repair at the time of the accident, but had been cut off in some manner and by some person not shown by the evidence, and that there is no evidence to show that the defendant was responsible for, or connected in any way with, such cutting, or had actual or constructive notice thereof, therefore their verdict must be for the defendant. (*Refused.*)

Defendant's 4th Prayer.—That in estimating damages in this case they cannot allow anything for the pain and suffering which Harry H. Smith may have endured after his acci-

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dent, nor for the grief and mental anguish of his wife occasioned by his death. (*Granted.*)

Defendant's 5th Prayer.—The defendant prays the Court to instruct the jury that they cannot find for the plaintiffs in this case unless they find:—

1. That the deceased at the time of his accident was using due and ordinary care such as an ordinarily careful and prudent lineman would use under similar circumstances; and,

2. That the defendant was guilty of some act of negligence on its part which directly contributed to the happening of the accident resulting in his death. (*Granted.*)

Defendant's 6th Prayer.—If the jury find from the evidence that the deceased, Harry H. Smith, by any failure to use due and ordinary care on his own part directly contributed to the happening of the accident which caused his death, then their verdict must be for the defendant, notwithstanding that they may find that the defendant was equally or even to a greater extent guilty of a failure to use due and ordinary care, and no matter how gross or culpable such failure on the part of the defendant may have been. (*Granted.*)

Defendant's 7th Prayer.—The defendant prays the Court to instruct the jury that the burden of proof is on the plaintiff to show affirmatively that the death of Harry H. Smith resulted from some failure on the part of the defendant to use due and ordinary care, and that a mere scintilla of evidence of such failure is not sufficient to justify a verdict for the plaintiffs. (*Refused.*)

Defendant's 8th Prayer.—The defendant prays the Court to instruct the jury that there is no evidence legally sufficient to show that the insulation on the wire where the accident occurred had been cut by the defendant or its agents or servants. (*Refused.*)

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS and WORTHINGTON, JJ.

Vernon Cook and Charles Markell, Jr. (with whom were *Gans & Haman* on the brief), for the appellant.

Joseph N. Ulman (with whom were *Harman, Knapp & Tucker* on the brief), for the appellee.

PEARCE, J., delivered the opinion of the Court.

This suit was brought by the State for the use of Mary O. Smith, widow, and Harry E. Smith, infant son of Harry H. Smith, deceased, against the Consolidated Gas Electric Light and Power Company to recover damages for the death of said Harry H. Smith, caused by the alleged negligence of the defendant. There was a verdict for \$4,800, of which there was apportioned by the jury to the widow the sum of \$2,300, and to the infant child \$2,500, and from the judgment on this verdict the defendant has appealed.

There are thirty-eight exceptions, the last being to the ruling on a motion to strike out certain evidence admitted subject to exception, and upon the prayers, and all the others being to rulings on the admission of evidence.

The deceased was a lineman of the Western Union Telegraph Company, and came to his death on May 8th, 1907, while engaged in his work as such lineman, by reason of his hand coming in contact with an electric light wire of the defendant company, carrying a current of 2,200 or 2,300 volts, supported upon a cross-arm belonging to the defendant company and maintained upon a pole of the Western Union Telegraph Company.

At the point where Smith's hand came in contact with this wire the insulation had been cut away by someone unknown, for the space of an inch, or an inch and a half, close to the cross-arm. The pole in question was a cable pole. At its top were seven double arms of the Telegraph Company carrying about sixty of its wires. The cable box was below these seven arms, and below these seven arms was a platform about twenty feet from the street, supported by two iron braces or angle irons bolted to the pole. About six feet below the

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lowest Western Union arm was the cross-arm of the defendant carrying its wires, and below that was another cross-arm belonging to the United Railways and Electric Company.

On the day of the accident, Smith, in company with Eyler and Uhler, two other linemen of the Telegraph Company, were engaged in stringing an insulated but uncharged wire from this cable pole on Guilford Avenue between Eager and Chase Streets to the Belvedere Hotel. Smith took a hand line to which was attached the wire to be strung, and with the rope in his hand he climbed the pole, Eyler being on the next pole south, and Uhler being on the elevated railroad-structure in the street at that point. Eyler described the situation as follows: "Smith went up to the angle irons under the platform * * * The angle irons he was against were on the opposite side of the pole from that shown in the photograph offered in evidence * * * I was there when it was taken. The photograph now handed to me is the photograph that was taken when I was present. He went up as high as the platform; then he went to pass the rope he had taken up; he got his right foot down in the angle iron on the east side of the pole, and had his left foot on the west angle iron, with his back leaning against the west angle iron, and taking the rope in his left hand, and holding on with his other hand, he threw the rope or twirled it over the wires, and tried to grab the end of it, but in throwing the rope his fingers came in contact with that bare spot, and I saw a flame at the point where his hand was in contact with the wire, and I called to Uhler: 'Harry is burning up.'" Eyler at once came down from his pole, ran to the pole on which Smith was hanging, and climbed it, and just as he was about to seize Smith's coat in the effort to release him, Smith fell to the ground insensible, and died an hour or two later. He was a young man about twenty-eight years of age, a powerful man, in excellent health, sober, industrious, and a competent lineman, of five years' experience, and receiving \$65 a month from the Telegraph Company.

It would be impossible, within any reasonable space, to examine all these exceptions separately, but they may be reduced to classes or groups without omitting anything essential to their proper consideration.

The first and third exceptions will be considered together. The plaintiffs' first witness, Wm. E. Dixon, testified that he was a ground man of the Telegraph Company, and was on the other side of the elevated structure; that Smith went to the pole to take the hand line and wire up, and he heard someone call out that a man was burning up; that he dropped the wire he was running off and ran towards the pole, and saw Smith fall. This was the whole substance of his testimony in chief, except his statement of the efforts to relieve Smith and of Smith's age, habits and health.

On cross-examination he said: "I didn't see what wire he came in contact with until after he had been killed. I looked at some of the wires, from the ground, after the accident, and I looked up." He was then asked, "Standing on the ground and looking up, what, if anything, did you observe as to the condition of the wires?" and plaintiffs' objection to this question was sustained. He was next asked, "When did you make this examination of the wires which you have just mentioned; how soon after the fall of Mr. Smith?" and this was also excluded on plaintiffs' objection on the ground in both exceptions that this was not proper cross-examination, as it referred to matters in no way connected with the direct examination. The evident purpose of these questions was to elicit from the witness, without making him a witness for the defendant, a statement that he saw *from the ground* that the insulation of these wires had been cut away near the pole. No inquiry had been made in his direct examination as to the condition of these wires, and no statement relating to the wires had been made by him in his testimony in chief. He knew nothing about the cause of the accident, or the circumstances attending it, except that he saw Smith fall. This is not like the case of *Duttera v. Babylon*, 83 Md. 546, cited in appellant's brief, where the witness,

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after testifying to the drawing, execution and delivery of a single bill, was allowed to be asked on cross-examination, who was present at that time and what was said by the maker of the bill, because these things were details of the essence of the very transaction to which he testified in chief. The latest case in this Court in which this question has been considered is *Black v. Bank of Westminster*, 96 Md. 399, in which was approved the liberal rule laid down in *Jones on Evidence*, Sec. 821, also cited in appellant's brief, but the Court there said much must be left to the discretion of the presiding judge in the determination of this question, and adopted the language of Mr. Jones in the same section, "that unless a trial Court should so far overstep the bounds as to admit that in cross-examination which clearly has no connection with the direct testimony, an appellate Court would not be justified in reversing a judgment for such cause, especially where the cross-examination is upon facts competent to be proved under the issues in the case." This discretion should be, and is, the same, whether in permitting or refusing such cross-examination, and it is obvious that in this case, under the issues raised, the fact apparently sought to be proved in cross-examination, was capable of proof, if a fact, either by calling Dixon as a witness for defendant, or by other witnesses who had knowledge of the condition of the wires on this pole. The good sense of the rule thus announced by Mr. Jones, and approved by this Court, is apparent in this case from the fact that the defendant subsequently proved by W. T. Russell, superintendent of the distribution of the electrical part of defendant's business, that he went to this pole next morning, and that from the ground he could see that the insulation had been removed from these wires.

We discover no error in these rulings.

The next group of exceptions embraces the 3, 4, 11, 12, 13, 14, 15, 31, and 36 exceptions. These all arose upon questions, the object of which was to draw from the witnesses their *inferences* as to the extent of the knowledge that the deceased, as an experienced lineman, had, or ought to have

had, as to the danger of these wires. One or two of these exceptions will serve to illustrate all. In the third, the witness Dixon had said on cross-examination: "Of course he (the deceased) was familiar in a general way with electric wires." He was then asked, "And he knew the danger of wires with a high current, didn't he?" In the fourteenth. Eyler on cross-examination had said that he had examined the insulation on the wire in question, and that it was only weather-proof insulation, and not pure rubber covering, and he was then asked: "Could not any lineman tell it by examination?" In the thirty-sixth, Russell, a witness for defendant, in his direct examination said it was dangerous to stand on a dry pole and handle alternating current wires without rubber gloves, and that he would fire any man who would do so. He was then asked, "Does not every experienced lineman know of that danger?" In all this group of exceptions the witnesses were asked to express their *opinions* on the very questions the jury were to decide in making up their verdict. It is carrying the theory of expert testimony too far to hold that they may express an *opinion* upon *every issue* arising in a case involving the technical knowledge and experience of a party to the cause. In 17 *Cyc.* 152, 153, it is said that where an inference as to a mental state rests merely in the opinion or belief of the witness, without any other basis for such inference, he cannot be permitted to testify to the existence of such mental state, and the author of the article says, "This is true of *knowledge, understanding*, and other mental states of another person, or of what entered into his consciousness by means of hearing, *vision* or other faculty." In *Union Pac. R. R. Co. v. O'Brien*, 161 U. S. 451, where the widow of a locomotive engineer sued for damages sustained by his death caused by frequent accumulations of sand upon the track derailing the train, another engineer familiar with the road was asked whether the engineers of the road were aware of these frequent accumulations and of the danger thereby created, but the question was held inadmissible. "The answer would have been purely an inference based on facts previously

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proved, and an inference which it was for the jury to draw from those facts." We find no error in these rulings.

The next group embraces the 5, 6, 7, 8, 9, 19, 22, 23, 24 and 25 exceptions. These all relate to the use of certain photographs of the cable pole in question which were admitted in evidence. It does not distinctly appear from the appellant's brief upon what ground these exceptions were taken, but the use of photographs "wherever it is important to describe a person, place, or thing, in a civil or criminal proceeding, for the purpose of explaining and applying the evidence" (17 *Cyc.*, 414) is so well established and so fully recognized in our own decisions, that we assume the objection must have been not generally to their use in the case, but rather to their method of introduction. It is a matter of course that "photographs must be shown by some extrinsic evidence to be correct representations of the place or subject as it existed at the time involved in the controversy." 17 *Cyc.*, *supra*. Perhaps the most usual method of verification is by the oath of the photographer himself, but this is obviously sometimes impossible, and to declare it the exclusive method when the photographer is living, would be to establish an unreasonable requirement. The authors of the article above quoted say, "The photograph, however, need not be verified by the oath of the photographer taking it; the foundation of its introduction may be laid by any one who testifies to its correctness as a representation or likeness." As to whether a photograph is sufficiently verified, or is practically instructive, the question is a preliminary question, for the Court, and while there is some diversity of authority as to whether the determination of the Court in this respect is open to review or not, we think the weight of authority is that this discretion is not the subject of exception unless it is plainly exercised in an arbitrary manner. It was so held in *Van Houten v. Moss*, 162 Mass, 414; in *Jameson v. Weld*, 93 Maine, 345, and in *Pritchard v. Austin*, 69 N. H. 367.

In the case before us, one of the two photographs admitted in evidence was shown by the witness, Eyler, to have been

taken in his presence and to be a correct representation of the pole and wires, and the other was admitted without objection by the defendant. In all such cases, if there is evidence of changes in the condition or surroundings of the object since the accident, this may lead to the exclusion of the photograph, and should do so, where the substantial identity of the conditions has not been preserved.

In this case, there is no such evidence and we find no error in these exceptions.

The next group embraces the 10, 17, 18, 20, 21 and 32 exceptions. These all arose upon objection to questions put by the plaintiffs to their witnesses about the re-taping of the bare places upon the wire with which Smith came in contact, and the adjacent wires of the defendant upon that cross-arm, after the accident, the objections of the defendant in each instance being overruled. These objections were based upon the generally accepted principle that evidence of subsequent repairs or precautions is not admissible to show a negligent condition at the time of the accident, a principle which has been approved in this State. If that were the purpose of these questions, the objections would be well founded, but we think it is quite clear such was not their purpose nor effect. It was in evidence that the insulation of these wires had not worn off by lapse of time or exposure to weather, but had been cleanly cut in the same manner and for about the same space from the pole, on all these wires. This certainly tended to prove that the cutting was not done by a trespasser, but by some one acting under a definite purpose. There was also evidence that it is necessary for electric companies from time to time to test their high current wires, and that to do this it is necessary to bare the wire at the point of testing, and this tended to show that the cutting was done by the defendant for the purposes of testing. If so done, the defendant's agents in charge of these wires, were negligent in not replacing the insulation *immediately* upon completing the tests. This is not the case of an accident occurring without apparent negligence on the part of the defendant, and

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where the plaintiff seeks to fix the charge of negligence by mere proof of subsequent repairs or precautions. This is precisely a case coming within the qualification of the general rule stated in *21 Amer. and Eng. Enc. of Law*, 2nd Edition, page 522, where it is said, "evidence of subsequent changes, though it may be in the way of repairs or additional precautions, is admissible when fairly tending to show the actual conditions existing at the time of the injuries." We are of opinion this evidence was properly admitted.

The sixteenth exception arose thus: It had been shown on cross-examination that the Telegraph Company furnished its linemen with rubber gloves, and that there was a pair in the gang Smith was working with, but he did not have them on at that time. Counsel for plaintiff then upon re-examination asked Eyler whether it was customary or general to use rubber gloves in doing such work. This was objected to, but the objection was overruled, and the witness answered, "not unless it was a very bad rainy day," and further testified that it was a perfectly clear, dry day when Smith was killed.

We understand that the question asked for the *general custom* in that line of work, in respect to the use of rubber gloves, not the special custom of the linemen of the Telegraph Company in Baltimore. The custom of the party injured, or even of the particular force of which he was a member, cannot be made the criterion of negligence. *Such* a custom may be a negligent custom, and the issue in accident cases of this character always is whether the particular conduct complained of was negligent. But there seems to be a distinction in this respect between the *general* custom prevailing in a calling, occupation, or trade, and the custom prevailing in a particular organization, or locality. In *7 Amer. and Eng. Enc. of Law*, 378, it is said: "The only test by which it can be determined whether ordinary care has been used or omitted in any particular case is the test of negligence in general, which may be formulated thus: There has been no want of ordinary care, when, under all the circumstances and surroundings of the case, the person injured, or those whose neg-

ligence is imputable to him, did or omitted nothing which an ordinarily careful and prudent person would not have done or omitted." And in 21 *Amer. and Eng. Enc. of Law*, 524, it is said, "if the act or omission was pursuant to a known custom or usage observed by persons engaged in the particular business, without injurious results, it is proper to consider this circumstance in determining what the person should have foreseen." The principle thus enunciated commends itself as rational and sound. It can scarcely be doubted that if it had been asked whether it was customary or general with ordinarily careful and prudent linemen to use rubber gloves in doing such work, that the question would have been a proper one. As framed however, the question had in fact a wider scope, and afforded a better test of due care to the jury, referring as it did to the general custom of all men engaged in that character of work. We therefore hold there was no error in this ruling.

The twenty-sixth and twenty-seventh exceptions relate to the testimony about the testing of these wires and the purposes for which the insulation was removed. Mr. Edmondson was the general foreman of the Telegraph Company and had held such positions for about thirty years. He erected the pole in question, was familiar with it in May, 1907, and inspected it the day of the accident. He described the manner in which the insulation was cut away at that time, and said it looked as if it had been cut with a knife. He was then asked what he knew about testing wires in Baltimore City, and the objection being overruled he said he knew tests were necessary for the location of trouble, and that the only effective way was to skin the insulation off, but that it is not necessary to leave the wire bare longer than when the test is made. He was then asked "what appeared to be the purpose for which they had been skinned?" and he replied, "testing, I judge for no reason but testing, and this was a very convenient pole for that purpose; it was stepped and there was a platform there; * * * and the manner in which it had been done showed that it was done for testing purposes."

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This witness was shown to be an expert in his line of long experience, and it is difficult to perceive any ground for the 26th exception.

The twenty-seventh exception however requires careful consideration. The subject of the limits of expert testimony is a vexed one, and the tendency of well considered cases in recent years is to restrict its admission. In the recent case of *Belt R. R. v. Sadtler*, 100 Md. 334, this Court said: "It is not desirable to enlarge the limits within which expert testimony is admissible, and whenever the ultimate fact desired to be proved, is from the nature of the issue, especially confided to the jury, it should be rigidly excluded." This language was carefully chosen by the learned judge who delivered the opinion, with regard to the particular question in that case, viz, whether expert testimony was admissible to prove the exact amount of damage sustained by a plaintiff by reason of smoke, cinders, gases and vibration resulting from the operation of a railroad in a tunnel adjacent to the plaintiff's property. In *Stumore v. Shaw*, 68 Md. 19, JUDGE MILLER said: "There is a general concurrence of authority and decisions in support of the proposition that expert testimony is not admissible upon a question which the Court or jury can themselves decide upon the facts; or, stated in other words, if the relation of facts and their probable results can be determined *without special skill or study*, the facts themselves must be given in evidence and the conclusions or inferences must be drawn by the jury." This language, we think, gives the true solution of the question before us, without in the least impairing the value of the utterance in *Belt R. R. v. Sadtler*, *supra*. We think, upon reflection, it must be obvious that no ordinary jury possesses the special skill or knowledge which would enable it to determine, from the mere fact that the insulation of these wires was cut away, by whom and for what purpose this was done. Their verdict, unaided by testimony from those whose special training and skill qualified them to judge, could only be speculation. Edmondson, however, brought to that question thirty

years of special training and observation. He found this pole fitted especially for testing purposes, with iron steps and a platform; he found that all the cuts were made in the same manner with a sharp instrument, and that these cuts were located just where they would be located if made for the purpose of a test. All this would be Greek to the average jurymen, but plain English to an expert in Edmondson's business. Aided by his testimony, they could intelligently consider that question. Without, they must either ignore it or resort to pure speculation. The case of *Galveston R. W. Co. v. Briggs*, 30 S. W. 933, illustrates this view, where an expert witness was permitted to testify from the appearance of certain dents in the woodwork of a car that he could say they were caused by one drawhead slipping over another. Moreover, if these cuts were not made for the purpose of testing, it was an easy matter for the defendant to show this by its agents in charge of their wires, and this is a consideration which cannot properly be disregarded. We find no error in this ruling, and it follows there was no error in the refusal to strike out this testimony, which motion constitutes a part of the 38th exception.

The 28th, 29th and 30th exceptions will be considered together. It had been testified by Eyler that Smith at the time of the accident stood with one foot in each brace of the angle and leaning against an angle iron. Edmondson, it seems, had put himself in that precise position, and plaintiffs' counsel then asked him if Smith, in that position, could see the bare places on the wire, to which the defendant objected, and the objection being overruled, the witness replied that he was two inches shorter than Smith, and that standing in the same place his eyes were two inches below some heavy gauge wires, "which I *judge* obscured his vision and he could not see the place." The next question was "And those wires, you say, would obscure his vision?" to which he replied, "I judge they would." He was then further asked, "What would be the effect of those wires upon the vision of a person?" and he

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replied: "They would obscure it, *because they are directly between the man and the wire he came in contact with.*"

It will be seen that these questions are all founded upon an actual observation of the witness, while in the exact position occupied by Smith at the time of the accident, and that this observation was made in the course of an *experiment* to ascertain *as a fact, and not as an opinion*, just how far Smith's vision was obstructed by these heavy gauge wires directly between his eyes and the wire by which he was killed.

The answers to the twenty-eighth and twenty-ninth questions standing alone would be of doubtful admissibility, but the answer to the thirtieth is a statement of fact. This answer we think is within the rule approved in *Richardson v. State*, 90 Md. 119, as to proof of experiments made under precisely the same circumstances as at the time of the occurrence in question, and which rule was further approved in *Keyser v. State*, 95 Md. 96, and *Gambrill v. Schooley*, *idem*, 283. In the light of the answer in the thirtieth exception, the answers to the twenty-eighth and twenty-ninth become harmless error.

In the thirty-third exception, counsel for plaintiffs asked Mrs. Smith, the widow, "Have you any property or means of support?" To which she answered, after the defendant's objection had been overruled, "I have not."

We agree with the appellant that under Lord Campbell's Act "the measure of damages is the pecuniary loss sustained by the equitable plaintiff by reason of the death for which suit is brought, and that whether this widow have, or have not means of her own, she would equally be entitled to recover from the defendant the amount lost by her by being deprived of the support furnished by her husband." The admission of such testimony is therefore irrelevant, in any case, and must tend to prejudice one of the parties in any event. Proof of poverty of the plaintiff must prejudice the defendant by exciting the sympathy of the jury, and leading them "to substitute sympathy for justice, and to award charity instead of

compensation." Proof of ample means of support on the other hand might induce the jury to withhold just compensation, though misfortune might at any moment deprive the plaintiff of his own means of support. The prejudice to be apprehended in the admission of such evidence would naturally be most dangerous to defendants, but neither party should be subjected to such danger. Upon reason we could not hesitate to hold that such testimony ought not to be admitted, and it appears that the weight of authority is to that effect. The cases are collected in 13 *Cyc.*, 359. The ground for the rule we approve is well stated in *Greene v. So. Pac. R. Co.*, 122 Cal. 564-5, and in *Central R. Co. v. Moore*, 61 Geo. 151, and this is the view adopted in the Courts of Illinois, Iowa, Kentucky and by one of the Federal Courts in 144 Fed. Rep. 379.

But in the case before us the jury has, very clearly, successfully resisted the apprehended appeal to their sympathy, and have not permitted themselves to go beyond moderate compensation. The uncontradicted proof is that Smith was a young man about twenty-eight years of age, in perfect health, and earning \$65 a month, or about \$800 a year. The widow, in view of her husband's age, must have been a comparatively young woman, and the son was born after the father's death. The father's duration of life, calculated by any standard mortuary tables, would have covered the minority of the child, and the widow's expectation of life would have covered the same period at least. The total amount allowed the widow and child was \$4,800. Assuming that this could have been permanently invested at six per cent. per annum, it would produce annually only about one-third of the annual earnings of the deceased, and that sum must be less than they would have received if he had lived, and is not adequate for their proper food and clothing and shelter. If the principal were drawn on to supply the deficiency of income, it would be exhausted by the time the child reached majority, or even before he reached the age of labor sufficient to sustain himself. We cannot therefore find any evidence

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whatever that the verdict was influenced by the testimony admitted, and we would not be warranted in reversing the judgment for a technical error with no concurring injury.

The relevancy of the inquiry in the thirty-fourth exception, whether the witness Uhler as a lineman did not know that all the electric companies in Baltimore used each others poles, is not perceived, and it need not be specially noticed.

The thirty-fifth exception was not referred to in the appellant's brief nor so far as we can remember in its oral argument. Mrs. Smith testified in chief that she had never released the Telegraph Company from any claim for her husband's death, and on cross-examination she was asked if she had not made a bargain with that company to sue only the Electric Light Company and that it would send Edmondson its superintendent as her chief expert witness, and on plaintiffs' objection this question was excluded. If there had been any evidence whatever to show that the Telegraph Company could in any way be held liable as a joint wrong doer, this ruling might have been erroneous but there was not a shred of evidence to that effect, and the question was only calculated to mislead the jury as to the real issue, viz, the negligence of the defendant.

The thirty-seventh exception arose upon the evidence in rebuttal, but was not noticed either in the appellant's brief or argument. Slocum, the defendant's inspector, had just testified that he inspected this pole about two weeks before the accident, and that there were no breaks or cuts in the insulation of these wires. Uhler was then called in rebuttal, and was allowed to testify over defendant's objection, that about April 1st, he was upon that pole, and then saw the insulation was off in places, as when Smith was killed. This would seem therefore to be a plain case of proper rebuttal, and we come finally to the prayers.

The plaintiff offered four prayers all of which were granted and the defendant offered eight. Its fourth, fifth and sixth prayers were granted and its first, second, third, seventh and eighth were refused. Its first, second and third prayers were

demurrers to the evidence. The first asserted there was no evidence legally sufficient to show any negligence on the part of the defendant directly contributing to the accident which caused the plaintiff's death.

The second asserted that it appeared by the uncontradicted evidence in the case that the deceased's own negligence directly contributed to his death; and the third asserted that it appeared from the uncontradicted evidence of the plaintiffs' witnesses that the insulation on the defendant's wires was not out of repair at the time of the accident, but had been cut by some person unknown, and that there is no evidence to show that the defendant was responsible for or connected in any way with such cutting, or had any actual or constructive notice thereof.

It is apparent from what we have said in discussing the exceptions to the evidence that we think each of these prayers was correctly refused.

Taking them up in the inverse order, if the evidence of Edmondson was properly admitted there was evidence tending to show that the cutting of the insulation was done for the testing of defendant's wires, for which cutting it would be responsible, and even if not done by its employees for that purpose, there was evidence given by Uhler, that the insulation was cut two weeks before the accident, a lapse of time ample to give constructive notice to the defendant of the condition of these wires. This is applicable also to the first prayer.

In reference to the second prayer Dixon testified that the method employed by Smith to string the wire was the method regularly employed, and Eyler when asked as an experienced lineman if the safe and proper way to get the rope up would not have been to go up higher and stand on the platform, replied that "he would have done the same that Smith did." If it be supposed that the prayer relied upon Smith's failure to use rubber gloves, this view is met by the proof that it was not usual or customary to use them except on very bad rainy days, and that the accident occurred on a dry clear day. In

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Ziehm's Case, 104 Md. 48, a very similar case, counsel for the Electric Company contended "that it was a simple matter of using the rubber gloves he carried, or not permitting his bare hands to come in contact with the high potential wires," but the Court reversed the judgment in favor of the defendant, holding the case was improperly withdrawn from the jury. The case of *Gloucester Electric Co. v. Dover*, 153 Fed. Rep. 139, is in point where a telephone lineman upon a pole used in common by it, and an Electric Light Company was injured by contact with a bare place on a high potential wire of the latter. This bare place was within four inches of the side of the pole, but was not seen by the man from the ground. The pole swayed from some cause and his hand came in contact with the bare wire. The defendant contended that it was unquestionable negligence for a man familiar with electric wires merely to look at the wires to ascertain their condition, and then allow himself to be brought in contact with them without the safety of a safe guard belt, and that contributory negligence should be ruled as matter of law; but it was held the question was properly one for the jury. So in *Commonwealth Electric Co. v. Rose*, 214 Ill. 545, it was sought to take the case from the jury, where a telephone lineman was injured by an electric light wire, on the ground 1st, that under the facts of the case he should have known of the defective insulation; 2nd, that he should have worn a safety belt, and 3rd that he should have worn rubber gloves. There was evidence that neither the belt nor gloves were absolutely necessary at all times, and the Court held the question of due care in the manner of doing his work was one for the jury.

In the case before us there is evidence that in the position Smith was, the heavy gauge wires were between his head and the bare wires, and there was no evidence that he saw or could have seen from the ground that the insulation had been removed. What has been said in reference to these three prayers of defendant applies also to the eighth prayer which was

correctly refused in view of the testimony of Edmondson as to the character of the cutting of the insulation.

The latter part of the defendant's seventh prayer renders it bad. In 6 *Enc. Pl. & Pr.*, 675, the Scintilla of Evidence rule is defined, as the rule applied, "whenever a party has produced a scintilla of evidence in his favor, because he is then entitled, in those jurisdictions where this rule prevails, to have his case submitted to the triers of fact." In conformity with this statement, this Court in *Savington's Case*, 71 Md. 599, says even a scintilla of evidence of negligence will not justify the Court in submitting the case to the jury." Whether there is only a scintilla of evidence is for the Court to say, and not for the jury, and where the Court so finds, its duty is to withdraw the case from the jury. It cannot submit the case to the jury because the Court finds there is *more than a scintilla*, and yet instruct that if they find there is *only a scintilla* they will not be justified in a verdict for plaintiff. *Clark v. Dederick*, 31 Md. 148, 150.

We are of opinion that the case was properly submitted to the jury upon the granted prayers of the plaintiffs and defendant, which we will request the reporter to set out, and finding no reversible error in any of the rulings, the judgment will be affirmed.

Judgment affirmed with costs to the appellee above and below.

Md.]

Syllabus.

MERCHANTS AND MINERS' TRANSPORTATION
COMPANY *vs.* MAURICE H. EICHBERG ET AL.—
M. H. EICHBERG ET AL. *vs.* CENTRAL OF
GEORGIA R. CO.

Carriers—Contract of Shipment Contained in Bill of Lading and in Letters—Stipulation in Bill of Lading That Negligence of Carrier Shall Not Be Presumed—Waiver of Stipulation as to Time of Making Claim for Damages—Measure of Damages—Action of Tort Against Two Connecting Carriers—No Evidence of Carrier's Negligence.

When before a shipment is made, the agent of the carrier writes a letter to the shipper stating the terms upon which freight will be carried, and the correspondence between the parties refers to the bill of lading, then the contract of shipment is contained in the letters and the bill of lading construed together.

When a bill of lading provides that negligence shall not be presumed against the carrier, then the burden of proof is cast upon the shipper to prove that an injury to the goods was caused by the negligence of the carrier.

While a common carrier cannot contract against liability for its own negligence, yet it may make an agreement that puts the burden of proving its negligence upon the shipper.

A bill of lading provided that if the shipper should elect not to accept the reduced rate at which the goods would be carried under a condition that negligence is not to be presumed against the carrier, then he should give notice in writing to the agent of the carrier, and by paying a somewhat higher rate, the common law liability of the carrier would attach except as limited by statute. *Held*, that when a shipper chooses to accept the reduced rate, he is bound by the provisions of the bill of lading, which put upon him the burden of proving that damage to the goods in the course of transit was caused by the negligence of the carrier.

The stipulation in a bill of lading requiring a claim for damage to the goods to be made in writing within thirty days after

delivery is waived when the agent of the carrier, with full knowledge of the facts, makes no objection on that ground to a claim presented by the shipper.

If the bill of lading stipulates that the amount of loss or damage for which the carrier is liable shall be computed at the value of the property at the time and place of shipment, then it is not necessary, in an action to recover such damage, to prove the value of the property at the place of delivery.

When goods transported by two connecting carriers are delivered in a damaged condition, an action of tort may be brought against both carriers.

The plaintiff shipped goods, as both consignor and consignee, from Atlanta, Ga., to Baltimore, Md., under a bill of lading issued by the railroad company which first received the goods and carried them from Atlanta to Savannah, and there delivered them to a steamship company for final transportation to Baltimore. Upon receiving the goods, the plaintiff alleged that they had been damaged in the course of transit and brought this action against both carriers. The bill of lading provided that no carrier should be liable for loss or damage not occurring on its portion of the route, and that negligence should not be presumed against any carrier. In said action, the plaintiff offered no evidence to show that the damage had been caused by the negligence of either carrier. *Held*, that, since under the bill of lading, no negligence can be presumed against the railroad company from the mere fact that the goods which had been delivered to it in good condition were received at their destination from the steamship company in a damaged condition, the trial Court properly instructed the jury that the plaintiff is not entitled to recover against the railroad company, because there was no legally sufficient evidence in the case that the goods were injured when in its possession by its negligence.

Held, further, that it was error on the part of the trial Court to refuse to instruct the jury, at the request of the steamship company, that there was no legally sufficient evidence that the goods were damaged while in its possession, and that therefore, under the pleadings, the plaintiff was not entitled to recover against that company.

Md.]

Statement of the Case.

Decided January 12th, 1909.

Appeal from the Superior Court of Baltimore City (ELLIOTT, J.)

Plaintiffs' 1st Prayer.—If the jury believe from the evidence that on June 12th, 1906, the plaintiffs wrote to Mr. C. S. Hoskins, Freight Traffic Manager of the defendant, a letter, of which a copy has been offered in evidence, and that on June 25th, 1906, the said C. S. Hoskins, Freight Traffic Manager of the defendant, sent the plaintiffs the letter of June 25th, 1906, which has been offered in evidence; and that subsequently thereto at the times mentioned in the evidence, in the execution of the agreement made by said two letters, the plaintiffs delivered to the Central of Georgia Railway Company at Atlanta, Georgia, the rolls of wrapping paper, the bundles of paper bags, and the machinery mentioned in the evidence, in good condition to the Central of Georgia Railway Company to be transported by it and by the defendant, the Merchants and Miners' Transportation Company, to Baltimore; and that some of the said rolls of wrapping paper and some of said bundles of paper bags, and some of said machinery when delivered by the defendant to the plaintiffs in Baltimore, was in a damaged condition and that a day or so after the arrival of said goods in Baltimore, one of the plaintiffs and their attorney called at the office of the defendant in Baltimore and requested permission to remove said goods before paying the freight therefor, and stated that said goods were in a damaged condition, and the agent of the defendant refused to permit the removal of the goods before the freight was paid, and stated that he knew all about the goods in question, and thereupon the plaintiffs paid the freight, and removed said goods; and that as the goods were removed, both a representative of the plaintiffs and a representative of the defendant made notations as to the condition of said goods; and that with reasonable diligence after receiving said goods, the plaintiffs ascertained the condition of said goods and as

soon as they reasonably could, had their counsel write to the defendant the letter mentioned in the evidence, dated October 6th, 1906; and that subsequently thereto the correspondence mentioned in the evidence passed between the defendant and its officers and the plaintiffs and their counsel, Mr. Rosenheim, then the verdict must be for the plaintiffs. (*Granted.*)

Plaintiff's 2nd Prayer.—If the verdict should be for the plaintiffs, then the jury are to allow them as damages the difference between the sum of money which was the market value in Baltimore of the goods at the time the plaintiffs received them from the Merchants and Miners' Transportation Company in the damaged condition in which the goods then were, and the sum of money which would have been the market value of the same goods in Baltimore at the same time if they had been delivered to the plaintiffs in good condition. And the jury may in its discretion allow the plaintiffs interest, on the sum awarded as damages from the time the said goods were delivered to them in Baltimore to the day of the verdict. (*Granted.*)

Defendant's 2nd Prayer.—That there is no legally sufficient evidence in this case that the goods referred to in the declaration and the evidence, or any of them, were injured or damaged while in the possession of the Merchants and Miners' Transportation Company, and therefore, under the pleadings in this action, the plaintiffs are not entitled to recover against the Merchants and Miners' Transportation Company. (*Refused.*)

Defendant's 8th Prayer.—If the jury shall find from the evidence that the paper and paper bags therein referred to were delivered by the Merchants and Miners' Transportation Company to the plaintiffs in substantially the same condition as they were in when it received them at Savannah, then the plaintiffs are not entitled to recover against said Company on account of any alleged damage to the same. (*Refused.*)

Defendant's 9th Prayer.—This defendant, the Merchants and Miners' Transportation Company, prays the Court to

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Argument of Counsel.

instruct the jury that the measure of damages for any of the goods mentioned in the evidence that they shall believe were injured by reason of the negligence or default of this defendant, is the difference between the market value of any goods so injured in Baltimore at the time of their delivery to plaintiffs, and the market value of such goods, if uninjured, at such time and place, and inasmuch as the plaintiffs have offered no evidence of such market value in Baltimore of the goods mentioned at the time of their delivery to the plaintiffs and of the market value at the same time and place of such goods if uninjured. The verdict of the jury, if for the plaintiffs, must be for nominal damages only. (*Refused.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and WORTHINGTON, JJ.

John J. Donaldson and *Charles A. Marshall*, for the Merchants and Miners' Transportation Company and Central of Georgia Ry. Co.

1. It would hardly seem needful to cite authorities for the position that where bills of lading are issued for a shipment they are the evidence, and the exclusive evidence, of the contract, unless there be some other writing connected with them and varying the terms they contain. *Brehme v. Adams Ex. Co.*, 25 Md. 328. *De Wolff v. Adams Ex. Co.*, 106 Md. 472.

It is submitted, however, that there is nothing in the letters referred to that is in any way inconsistent with the contract evidenced by the bills of lading.

The letter of plaintiffs to Hoskins mentions the rate per hundred weight to be paid for the carriage of the goods (being the rate actually paid); states it as a condition of the shipment that the Merchants and Miners' Transportation Company should either inspect the shipment before it left Atlanta or accept the clean bill of lading of the Central of Georgia

for evidence that the shipment left in good order, and that, in case any damages WERE SHOWN, the Merchants and Miners' Transportation Company would agree to settle such damage within thirty days after arrival of goods in Baltimore.

The answer to this of Mr. Hoskins gives the same rates, but in dealing with the matter of any claim made, says: "We agree to settle any claim for which the Merchants and Miners' Transportation Company and/or Central of Georgia Railway are *responsible* within thirty (30) days after the conclusion of our investigation and within sixty (60) days after the arrival of the shipment in Baltimore."

Assuming, for the moment, that the two letters are at one in their terms, they contain nothing whatever in *contradiction* of those contained in the bills of lading, but merely *add* a term dealing with the *time of settlement* of any loss for which the carriers are responsible.

It will be observed that the plaintiffs looked to the issue of a bill of lading for the shipment. Their letter of June 12, 1906, to Hoskins reads: "You will either inspect the shipment before it leaves Atlanta or accept the clean B/L (Bill of Lading) of the Central of Georgia, etc."

Even without this, however, we take it to be clear law that where there is a treaty by correspondence between carrier and shipper looking to the carriage of goods, the parties must be taken to intend to incorporate into their agreement the well-known usages of shipping, among the rest the issue of bills of lading for the shipment, and accordingly when such bills of lading are issued, they must be taken as fixing the rights and liabilities of the parties. *Donovan v. Standard Oil Co.*, 155 N. Y. 112.

If we are right in our contention, the contract of carriage is to be found in the correspondence *and* the bills of lading taken together, and the Court below erred in finding it only in the correspondence.

2. Even if there were any inconsistency between the correspondence and the bills of lading, these being later and on their face complete, superseded all that had gone before, and

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Argument of Counsel.

became the exclusive evidence of the contract between the parties. *Leake, Contr.*, 173-4; *Knight v. Barber*, 16 M. & W. 66; *Howard v. W. & S. R. R. Co.*, 1 Gill, 311; *Delamater v. Chappell*, 48 Md. 244; *Franklin v. Claflin*, 49 Md. 24; *Warren Co. v. Keystone Co.*, 65 Md. 547; *Gorsuch v. Rutledge*, 70 Md. 272; *Long v. N. Y. H. R. R. Co.*, 50 N. Y. 76; *The Caledonian*, 43 Fed. R. 680.

When the contract between the parties is in writing, the antecedent letters between the parties are inadmissible. *Stockham v. Stockham*, 32 Md. 196, 207; *Badart v. Foulon*, 80 Md. 579, 591.

Nor is this the only difficulty in holding the letters in question the exclusive evidence of the contract.

That of plaintiffs of June 12, 1906, is of course to be treated as an offer, but Hoskins' reply of June 25 is not an acceptance, because it varies the terms. It can only be taken then as a counter offer. But, if so, where is there evidence of an acceptance of it by plaintiffs?

Not in the shipment of the goods, because that was done under the contracts evidenced by the bills of lading issued and accepted by plaintiffs at time of shipment.

We therefore submit that in any point of view whether (1) the contract be found in the correspondence and the bills of lading taken together (the correct construction as we think) or (2) exclusively in the bills of lading, it is to these latter we must look to ascertain the rights and liabilities of the parties.

The Bills of Lading provided that (1) "No carrier shall be liable for "loss or damage not occurring on its portion of the route. * * *"; and (2) "Nor shall negligence be presumed against any carrier."

The provisions first referred to limiting the liability of each carrier to its own route, merely makes as a term of the contract the rule of the Common Law in force in Maryland. *B. & O. R. R. Co. v. McCann*, 20 Md. 202; *B. & O. R. R. Co. v. Green*, 25 Md. 72; *P. W. & B. R. R. Co. v. Harper*,

29 Md. 330; *P. W. & B. R. R. Co. v. Lehman*, 56 Md. 209; *Hoffman v. Valley R. R. Co.*, 85 Md. 391.

As we have endeavored to show there is nothing in the correspondence to make the Merchants and Miners' Transportation Company responsible beyond its own line—there is only an added term as to mode of settlement for losses for which either carrier was "responsible."

The plaintiff offered no proof of any damage done on its line. It would therefore seem clear that defendant's second and fourth prayers should have been granted.

Further, it was proved by the Merchants and Miners' Transportation Company that it delivered the goods to plaintiffs at Baltimore in substantially the same condition in which it received them at Savannah from the Railway Company, and plaintiffs offered no evidence whatever in contradiction of this. We therefore submit that defendant's eighth prayer should have been granted.

The bills of lading expressly provide: "nor shall negligence be presumed against any carrier."

That such a provision is valid there can be no doubt. *N. J. Steam Nav. Co. v. Bank*, 6 How. 384; *Bankard v. B. & O. R. R. Co.*, 34 Md. 197.

There is no proof of negligence on the part of either carrier, and as to the Merchants and Miners' Transportation Company there is proof entirely uncontradicted to the contrary, viz: that the goods were by it delivered at Baltimore in the same condition in which it had received them at Savannah. And therefore plaintiffs' first prayer should have been rejected and defendant's second granted.

There was no dispute as to the rule of damages, viz: the difference between the market value at Baltimore on arrival of the goods as injured and the market value there and then of the same goods if uninjured. As to such market value there is no proof whatever in the Record, and it is therefore submitted that the Court erred in overruling the special exception and granting plaintiffs' second prayer and refusing defendant's ninth prayer.

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Argument of Counsel.

The action was brought against the two companies as JOINT-tortfeasors. After the acquittal, by the Court's direction, of one of the companies, the plaintiffs *did not amend*, but the case proceeded against the remaining defendant under a declaration charging a JOINT tort.

It is elementary that a tort must be joint to sustain a joint action. *Dicey, Parties to Actions* [431-2]; *Nicoll v. Glennie*, 1 M. & S. 588; *Bennett v. Fifield*, 13 R. I. 139. Here the proof is of the single tort of the Merchants and Miners' Transportation Company, and thus a variance from that alleged in the declaration.

There was no error in granting the prayer at the conclusion of plaintiffs' testimony directing the acquittal of the Central of Georgia Railway Company.

Whether the contract of carriage be found in the correspondence (to which, however, *this defendant* was not a party) and the bills of lading together, or in the bills of lading alone, yet, as we have urged, in the latter is to be found the measure of the rights and liabilities of the parties.

There is in the record no proof of negligence on its part, and by the terms of the bills of lading negligence is not to be presumed against any carrier. So, even if there were direct proof (as there is not) that the goods were damaged while in the possession of the Central of Georgia Railway Company, this would be no proof of negligence.

Moreover, under the pleadings (to which the prayer in question expressly refers) the proof to entitle plaintiffs to recover must have been of a *joint* tort, and of this there is none in the record.

William S. Bryan, Jr., (with whom was *Benj. Rosenheim* on the brief), for M. H. Eichberg *et al.*

The prayers directing the jury to find a verdict for the Merchants and Miners' Transportation Company were properly rejected. The plaintiffs' testimony showed very clearly that the goods were in good condition when delivered to the initial carrier, the Central of Georgia Railway Company, at

Atlanta, and that these same goods were in very bad condition when received from the terminal carrier, the Merchants and Miners' Transportation Company.

It is a well settled rule that when goods are delivered in good order to the initial carrier and are received in bad order from the terminal carrier, the presumption is that they were injured by the negligence of the terminal carrier. 4 *Elliott on Railroads*, section 1450; *Penn. R. Co. v. Naive*, 64 L. R. A. 443, 449; *Orem Fruit Co. v. N. C. Ry. Co.*, 106 Md. 1.

Besides this general presumption of fault in the terminal carrier, because he can show whether or not the goods were received by him in bad order, and the shipper cannot show whether or not the goods were received in bad order by such terminal carrier, it must be remembered that in consideration of their getting the business, the Merchants and Miners' Transportation Company had given a special rate for the entire movement of the freight and had agreed to make themselves responsible as carriers for the whole transportation. "We agree to settle any claim for which the Merchants and Miners' Transportation Company and for Central of Georgia Railway are responsible within thirty (30) days after the conclusion of our investigation, and within sixty (60) days after the arrival of the shipment in Baltimore"—wrote the Freight Traffic Manager of the Merchants and Miners' Transportation Company to the Paper Mills Company when he was endeavoring to secure the business.

It is very clear that it was entirely competent for the Merchants and Miners' Transportation Company to agree to act as carrier for The Paper Mills Company beyond the limits of its own line. 2 *Elliott on Railroads*, sect. 364; *Hoffman v. C. & P. R. R.*, 85 Md. 395; *B. & O. v. Green*, 25 Md. 72, 90; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 181, 183; *Boscowitz v. Adams Express Co.*, 93 Ill. 523.

In the case at bar, the Merchants and Miners' Transportation Company made the contract of carriage with The Paper Mills Company and received the entire freight charge from them.

Md.]

Argument of Counsel.

Counsel for the Merchants and Miners' Transportation Company in the Court below endeavored to hold The Paper Mills Company to the terms of the Bills of Lading in enforcing their claim to compensation for injury done their goods. It is suggested that the letter of June 25th, 1906, is the effective contract of carriage. "Where there are two contracts of shipment, both representing the same shipment, the carrier cannot in the event of a loss elect that the one containing limitations of its liability shall constitute the real contract of shipment, but * * * the contract which least limits the carrier's liability will be taken as the true contract of the parties." 5 *Am. & Eng. Encyclop. of Law* (2nd Ed.), 296.

"Special contracts limiting the common law liability of carriers are in derogation of the common law, and are to be construed most strongly against the carrier in so far as they operate to relieve him from liability; any ambiguity in them is to be solved in favor of the shipper. Thus, where there are two contracts limiting the carrier's liability, he is bound by the one which is less beneficial to himself." 5 *Am. & Eng. Encyclop. of Law* (2nd Ed.), 335-338.

After the Merchants and Miners' Transportation Company contracted for and undertook the carriage of The Paper Mills Company's goods from Atlanta to Baltimore, it became its duty to carry such goods carefully, and if it failed to do so it was within the power of The Paper Mills Company to sue it either in contract or in tort. *B. & O. v. Pumphrey*, 59 Md. 399. "The mere fact that there is a special contract, varying and limiting the carrier's common law liability, does not prevent the party injured from suing in tort, if he prefers that form of action. The undoubted rule, both in England and in this country, is that the party aggrieved has his option to sue on the contract or in tort for a breach of the duty arising therefrom." 3 *Encyclopedia of Pleading and Pract.*, 823-4.

This being an action of tort against both defendants there is no difficulty about recovering against one of them only. *Poe on Pleading*, sects. 296, 526, 528.

Therefore the First Prayer of the Merchants and Miners' Transportation Company was properly rejected by the Court below.

The Fifth Prayer of the Merchants and Miners' Transportation Company sets up the defense that the terms of the Bills of Lading provide: "Claim for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after delivery of the property or after due time for the delivery thereof, no carrier hereunder shall be liable in any event," and inasmuch as by the uncontradicted evidence in this action the plaintiffs did not so present their claim or claims in writing to such agent within the time specified by the above-mentioned provision the verdict must be for defendant.

The facts stated in plaintiffs' first prayer when found by the jury, as they were when the verdict was rendered for the plaintiffs, showed: (a) that it would have been highly unreasonable under the circumstances to have required the shippers to give the carrier the written notice called for; and (b) that by replying to the letter of October 6th, 1906, the defendant waived any right it might otherwise have had to rely on such want of written notice.

It is true that the carrier may lawfully stipulate by contract that notice of a claim for damages shall be given within a specified time in order to be valid, and such stipulation is regarded as reasonable. The construction put upon these stipulations must, however, be reasonable and adapted to the circumstances of each case. 3 *Am. and Eng. Encycl. of Law* (1st Ed.), p. 15; *Express Co. v. Caldwell*, 21 Wallace, 264.

"If the circumstances are such that the loss or damage cannot by the exercise of reasonable diligence be discovered within the time limited, the presentation of the claim within a reasonable time thereafter will be sufficient; and, indeed, it has been held that if the stipulation is unreasonable as applied to the circumstances of the particular case, no notice at all is

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Argument of Counsel.

necessary." 4 *Elliott on Railroads*, sect. 1512. See also:—
5 *Am. and Eng. Encyc. of Law* (2nd Ed.), 323.

This clause or stipulation as to the time in which the shipper can make a claim has no application where the carrier is, of necessity, aware of the loss and its extent, or where the injury to goods was examined by the carrier's agent in person. 5 *Am. and Eng. Encyc. of Law* (2nd Ed.), 324-5.

So the stipulation requiring the claim to be presented within a specified time may be waived by the carrier. 5 *Am. and Eng. Encyc. of Law* (2nd Ed.), 322, 323, and note 1; *Wood v. Southern R. R.*, 118 N. C. 1056; *Hess v. Mo. Pac. R. Co.*, 40 Mo. App. 202.

Besides all these considerations, the letter of June 25th, 1906, which is the effective contract of carriage of this paper and machinery, has no stipulation in it requiring a claim in writing to be made by the shipper within thirty days. As already shown, it simply agrees to settle the claims for losses for which itself or the Central of Georgia Railway Company might be responsible, within thirty days after the conclusion of their investigation and within sixty days after the arrival of the shipment in Baltimore.

There is no merit in the special exceptions to the plaintiffs' second prayer on the ground that there is no legally sufficient evidence of what was the market value in Baltimore of the goods mentioned in this suit in their damaged condition, nor of what would have been the market value of such goods in Baltimore if they had been undamaged. Mr. Hirsch specifically testified on both of these points.

The measure of damages where goods are injured during transportation by a carrier is as set forth in plaintiffs' second prayer. 5 *Am. & Eng. Encyc. of Law* (2nd Ed.), 373; *Idem*, page 382; *B. & O. v. Pumphrey*, 59 Md. 390.

This same testimony is also the reason why the learned Judge below was right in rejecting the defendant's ninth prayer which claimed that there was no evidence of the market value of the goods damaged, and that, therefore, the verdict should be for nominal damages only.

As there was testimony that the goods mentioned in this case were in good condition when delivered to the Central of Georgia Railway Company, and were damaged when delivered to the consignee, the Central of Georgia could only exonerate itself by proving that it delivered the goods in proper condition to the connecting carriers, the Merchants and Miners' Transportation Company. "When goods are delivered in good condition to an initial carrier to be by it delivered for further transportation to a connecting carrier, and the goods at their destination are delivered in a damaged condition, the burden of proof, in an action against the first carrier, is on it to show delivery in a good condition to the connecting carrier, when such proof is within its power." *Orem Fruit Co. v. N. C. R. Co.*, 106 Md. 1.

The case at bar shows how essential this rule is, if justice is to be obtained against these transportation companies. In this case after the granting of the prayer instructing the jury that there was no evidence that the goods were injured or damaged while in the possession of the Central of Georgia Railway Co., and that therefore the verdict must be for that defendant, the Merchants and Miners' Transportation Co., the connecting carrier, coolly proceeded to prove, by some convenient witnesses, that at the time the goods were delivered to its line at Savannah by the Central of Georgia Railway Company said goods were in substantially the same condition as they were when delivered by the Merchants and Miners' Transportation Company to the plaintiffs in Baltimore.

While there was, it is respectfully maintained, manifest error in taking the case away from the jury so far as the Central of Georgia Railway Company was concerned, and while therefore The Paper Mills Company are entitled to have the judgment reversed on its appeal, The Paper Mills Company does not wish to disturb the judgment rendered in the Court below if this Court should affirm that judgment on the appeal of the Merchants and Miners' Transportation Company.

Md.]

Opinion of the Court.

WORTHINGTON, J., delivered the opinion of the Court.

This is an action of tort brought in the Superior Court of Baltimore City by the appellees, trading as The Paper Mills Company, against the Merchants and Miners' Transportation Company, and the Central of Georgia Railway Company, as joint defendants, to recover for damages alleged to have been sustained by the plaintiffs through the negligence, improper conduct, lack of skill and care, and wrongful action of the defendants, and each of them, in transporting a large quantity of wrapping paper and paper bags, and also certain machinery from Atlanta, in the State of Georgia, to Baltimore, in the State of Maryland. The case was before this Court at the October Term, 1907, upon the question of the sufficiency of the service of process on the Central of Georgia Railway, one of the defendants, and some of the facts are set out in the report of that appeal in 107 Md. 363.

The service of process having been held sufficient, the case proceeded to trial in the Court below against both defendants, and a judgment in that Court for \$9,734.76 was obtained against the Merchants and Miners' Transportation Company, alone, the Central of Georgia Railway Company obtaining a judgment in its favor, under an instruction of the trial Court.

The unsuccessful contestants in both instances have appealed to this Court.

We will first consider the appeal of the Merchants and Miners' Transportation Company.

The learned Judge in the Court below by granting the plaintiffs' first prayer, practically decided that the whole contract of carriage between the parties is contained exclusively in the two letters, one of date June 12th, 1906, and the other of date June 25th, 1906, which passed between the plaintiffs and Mr. C. S. Hoskins, Freight Traffic Manager of the Merchants and Miners' Transportation Company, and which are printed in the record. But we think the true contract is to be found in these two letters, or rather in the one of date June 25th, 1906, and in the bills of lading issued to

the plaintiffs by the Central of Georgia Railway Company, taken and considered together.

The letters set forth merely the rates at which the goods will be carried, and the time, within which any claim for damages would be settled. It may well be assumed that when these letters were written, the well-known usage and custom of issuing bills of lading with the several shipments, were within the contemplation of the parties.

Indeed the plaintiffs in their letter of June 12th refer to the "clean B-L of the Central of Georgia for evidence" as to the condition in which the shipments would leave Atlanta, thus clearly indicating that they had in mind the receipts usually issued by carriers when goods are accepted by them for carriage.

A similar view was held by the Court of Appeals of New York in the case of *Donovan v. Standard Oil Company*, 155 N. Y. 112, where the Court said: "This instrument (the bill of lading) must be read with the letter referred to under which the plaintiffs entered into the general arrangement, in order to ascertain the full extent of their duties and obligations as carriers."

Having decided that the bills of lading form part of the contract of carriage, it becomes our duty to construe certain portions of them, which give rise to the controversy in this case.

The clause which gives rise to the most important question is contained in the eleventh section of these bills of lading, and is as follows: "Nor shall negligence be presumed against any carrier."

The question is how does this clause affect the burden of proof?

We think it must be given its full force. That is to say, the burden is upon the plaintiffs to show not only the injury, but also the negligence that caused the injury.

The common law presumption of negligence, where damage merely is shown, is negatived by the express stipulation of the contract. It will not suffice to prove merely that the

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goods were delivered to the carrier in good condition and received by the consignee in a damaged condition, but negligence causing the injury must be proven.

In the absence of contract, the law makes the carrier an insurer, and as the goods it carries may be injured or destroyed by many causes not due to its own negligence or want of care, the carrier is as much entitled to be paid a premium for its insurance of their safe delivery at the place of destination as for the labor and expense of conveying them there. *Riley v. Horne*, 15 E. C. L. 551.

While the carrier may not contract against its own negligence (1 *Hutchinson on Carriers*, Sec. 450), it may contract so as to put the burden of proving the negligence upon the plaintiff.

It was so held in the case of *N. J. S. N. Co. v. Bank*, 6 How, 384, which was followed by our predecessors in the case of *Bankard v. B. & O. R. R.*, 34 Md. 197.

In the former case, MR. JUSTICE NELSON, speaking for the Supreme Court, said: "The respondents having succeeded in restricting their liability as carriers by special agreement, the burden of proving that the loss was occasioned by the want of due care, or by gross negligence, is upon the libellants, which would be otherwise in the absence of any such restriction."

In the case at bar the contract of carriage provided that if the shippers elected not to accept the reduced rates for transportation and the conditions contained in the bills of lading, they should give notice to the agent of the receiving carrier in writing, and by paying a somewhat higher rate, the carrier's common law liability would attach except as limited by the laws of the United States and of the several States, so far as any such statutes applied.

The plaintiffs deliberately chose the reduced rate, and thereby assumed under the conditions of the bills of lading which they accepted the burden of proving negligence against the carriers in case any loss or injury to the goods should

occur in the course of the transportation, and it is not for this Court to relieve them of the burden which they thus assumed.

As regards the stipulation in the bill of lading requiring any claim for loss or damage to be made in writing within thirty days after the delivery of the property, we think that such stipulation was waived by the carrier, whose agent with full knowledge raised no objection to the claim on that ground. 5 *Am. & Eng. E. Law* (2nd Ed.), 322-5.

No objection is made to the granting of the plaintiff's second prayer concerning the measure of damages, except on the ground that there is not sufficient evidence to go to the jury as to the market value of the goods at Baltimore, in either an injured or uninjured condition on their arrival in that city.

We think the evidence in this respect too meagre, but as there is a provision in the bill of lading to the effect that "the amount of any loss or damage for which any carrier becomes liable, shall be computed at the value of the property at the place and time of shipment under this bill of lading," the measure of damage should be in accordance with this provision; that is, their value should have been ascertained at Atlanta, as of the days and times of shipment. It was so held by this Court in the case of *McCoy v. Erie R. R. Co.*, 42 Md. 498, under a similar provision in the bill of lading in question in that case. Of course, the parties may waive this provision in the present case, if they so desire.

We think the proceedings were properly brought in tort jointly against both carriers. *B. & O. R. R. Co. v. Pumphrey*, 59 Md. 399; 1 *Poe Pldg.*, Secs. 296, 526, and 528; *Mershon v. Hobensack*, 22 N. J. L. 380.

As to the appeal of the Paper Mills Company from the action of the trial Court in dismissing the suit as against the Central of Georgia Railway Company, we think such action was proper.

The plaintiffs had closed their case without offering any evidence whatever of negligence on the part of this defendant, and by the contract of carriage under which the goods were shipped no negligence could be presumed against it from

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the mere fact that the goods which had been delivered to it in good condition were received at their destination from the terminal carrier in a damaged condition.

For these reasons we think there was error on the part of the learned Judge in the Court below in granting the plaintiffs' first and second prayers, and in refusing to grant the defendant's second, eighth and ninth prayers, and we must therefore reverse the judgment in No. 62, but as the plaintiffs may be able upon a second trial to adduce evidence of negligence, we will award the plaintiffs a new trial as to the Merchants and Miners' Transportation Company.

*Judgment in No. 62 reversed with costs
and new trial awarded.*

*Judgment in No. 63 affirmed with costs to
appellee.*

JOHN M. SHEA ET AL. vs. MARIE M. EVANS.

*Specific Performance—Restrictions as to Use of Land Not
Known to Purchaser.*

When a vendor of land does not inform the purchaser that there are restrictions relating to the character of buildings that may be erected upon it, and their location, which may affect its market value, and the purchaser is not aware of the existence of such restrictions, specific performance of a contract to purchase the land will be refused.

Decided January 20th 1909.

Appeal from the Circuit Court No. 2 of Baltimore City
(GORTER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

John J. Hurst and John Grason, for the appellants.

Wm. S. Bansemer and Stevens T. Mason, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

This is an appeal from a decree dismissing the bill filed by the appellants against the appellee, which sought to compel the latter to specifically perform a contract for the purchase of sixteen lots laid out in what is called Ruxton Heights in Baltimore County. The only written evidence of the contract is an account stating that Mrs. Evans bought of McGuire and Shea, sixteen lots at Ruxton Heights known as Nos. 1, 2, 3, etc., (giving the number of each), stating the consideration to be \$3,000.00, crediting that "By cash on account of sale \$50.00" and showing balance due \$2,950.00. That was signed by Mrs. Evans and was dated Oct. 22, 1907.

It will be observed that the contract is very meagre—not stating when the balance of the purchase money was to be paid, where the description of the lots could be ascertained, whether there is a plat on record, or the character of title held by the vendors. Some testimony was taken as to the value of the lots, but in the view we take of the case it will be unnecessary to discuss that. The defense mainly relied on by the defendant was that the plaintiffs made such misrepresentations to induce her to purchase, that a Court of Equity should not specifically enforce the contract, if otherwise binding. It is proper to say that the plaintiffs deny that charge, and claim that the defendant had every opportunity to inform herself of the actual condition of the property. The lots were advertised for sale at public auction on September 28, 1907, and the appellee seems to have been first attracted to them by that advertisement. She together with some others was present at the appointed time, but the weather was very bad, and no sales were made. Afterwards the appellants

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sought to interest the appellee in the lots. Mr. McGuire, one of them, dealt with her, persuaded her to go over the property at a later time, and sold her the lots stated in the account. He endeavored at first to get her to give \$300 for each lot, with ten per cent. discount for cash, then \$4,000 for the sixteen, afterwards \$3,500 and finally accepted her offer of \$3,000.00. He then made out the account and had her sign it. Two days later the two appellants and the appellee went to the office of Mr. Bansemer, who was her attorney, and Mr. Shea handed him a memorandum of restrictions to go in the deed, which was as follows: "That no part of any building shall be erected nearer to the avenue or street front than fifteen (15) feet; that no barn, stable, coop, or other outbuilding shall likewise be erected nearer to the avenue or street front than fifty (50) feet."

Afterwards Mrs. Evans called on Mr. McGuire and said she wanted a provision inserted in the deed that Maywood Avenue was to be macadamized, which he said was not necessary, and then she referred to the fact that there was no electric road there, and finally demanded the \$50 she had paid them. The next morning Mr. Bansemer notified Mr. McGuire that Mrs. Evans had decided "to cancel that contract," to use the language of the witness. She claims that misrepresentations were made as to an electric road to be constructed, as to macadamizing the avenue, and as to certain proposed purchasers for some of the lots. But what seems to us to be the most material objection to the enforcement of the contract is the fact that the use of the property is subject to a number of restrictions, which are not shown to have been brought to her attention before she made the purchase or to have been agreed upon by her. The following admission is stated in the record:

"NOTE.—It is admitted by counsel for the plaintiffs, at the request of counsel for the defendant, that the restrictions under which the title to the lots in question must be conveyed by the plaintiffs, are as follows, to wit: 'That the parties of the second part, the vendee, will not at any time within fif-

teen years from the day of the date of the deed for said premises, erect or build, or cause or permit to be erected or built, upon said premises, or any part thereof, any hotel, tavern, drinking saloon, blacksmith, carpenter or wheelwright shop, steam mill, tannery, slaughter house, skin drying establishment, livery stable, glue, soap, candy or starch manufactory, or use for any offensive purpose or occupation; that no part of any building shall be erected nearer to the avenue or street front *from* fifteen feet; that no barn, stable, coop or other outbuilding shall likewise be erected nearer to the avenue or street front than fifty feet; and that no dwelling house costing less than two thousand dollars shall be erected or built upon said premises within fifteen years from the date of the deed that may convey the aforesaid premises to the vendee.' "

It is true Mr. Shea swore that on the day the lots were offered at public auction he told Mrs. Evans of the various restrictions, but she positively denied any knowledge of them. Mr. McGuire, who had most of the dealings with her, admits that he did not tell her, and said that so far as he knew, she never saw the memorandum first above quoted until it was given to Mr. Bansemer. It is certainly remarkable that even when they went to counsel to have the deed prepared the memorandum then given did not include some of the most important restrictions which it is now admitted "the title to the lots in question must be conveyed" subject to. Another striking fact is that both the advertisement of the sale of lots when offered at public auction, and the account which Mr. McGuire took the precaution to have Mrs. Evans sign are silent on the subject of the restrictions. It is clear that the plaintiffs failed to establish that Mrs. Evans either agreed to take the property subject to such restrictions, or had any notice when she entered into the contract that the lots were to be so subject. It cannot be denied that some of the restrictions might affect the market value of the lots and might prevent a sale of some of them. It is doubtless true that many neighborhoods are made more attractive by having some such restrictions as these, but whether they are desira-

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ble must depend largely upon the character of the settlement. The prohibition of the erection of a hotel, blacksmith, carpenter or wheelwright shop, steam mill or livery stable, not to mention some of the other buildings named, would prevent some persons from purchasing, and to prohibit the erection of a dwelling house costing less than \$2,000 might deter others from buying lots. That minimum is ten times what the appellee was to pay for each lot. Another peculiarity is that the restrictions are for fifteen years from the date of the deed. The testimony is that these lots had been laid out for about sixteen years, and it may be that some of them were sold years ago, and may now or soon be free from such restrictions, while those involved in this transaction would continue to be so for fifteen years.

But whatever the effect of such restrictions may actually be, the Court cannot say that they will not affect the value of the lots, and Mrs. Evans cannot be required to accept them, subject to the restrictions, in the absence of more satisfactory proof that she had agreed to them, or knew of their existence. Vendors owning lots with restrictions such as these must inform purchasers of them, or see that they are aware of them, if they want Courts of Equity to enforce such contracts. When a contract for sale of land has nothing more in it than there is in this, a Court of Equity if called upon to enforce it by the vendor, will require him to have a good marketable title, and the same principle would demand that it be free from such restrictions as would likely affect its value, in the absence of satisfactory proof that it was known by the vendee that the property was to be conveyed subject to them.

In *Gill v. Wells*, 59 Md. 492, JUDGE MILLER said: "It is a principle, obviously just, in the law relating to the specific performance of contracts, that the vendee is entitled to have that for which he contracts before he can be compelled to part with the consideration he agreed to pay. He is not bound to take an estate fettered with incumbrances by which he may be subjected to litigation to procure his title; and in a contract such as is sought to be enforced in this case, the

vendee is not bound to accept anything short of an unincumbered legal estate in fee, the title to which is free from reasonable doubt." Or as said in *Dobbs v. Norcross*, 24 N. J. Eq. 327, and quoted with approval in *Gill v. Wells*: "He shall have a title which shall enable him not only to hold his land, but to hold it in peace; and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value."

That restrictions such as these would prevent a Court of equity from decreeing the specific performance of a contract for sale of lands subject to them, is shown by the decisions in *Halle v. Newbold*, 69 Md. 265; *Newbold v. Peabody Heights Co.*, 70 Md. 493; *Peabody Heights Co. v. Wilson*, 82 Md. 186, and others that might be cited. In *Halle v. Newbold*, after holding that a grantor could impose a restriction in the nature of a servitude or easement upon the land that he retains, for the benefit of that he sells or leases, etc., it was said that: "Such servitude is an encumbrance upon the land upon which it is imposed and the title of the owner of the land is not clear." We are relieved from discussing the question whether such restrictions are binding upon purchasers who take with notice, as the above cases have settled that, and in this case we have seen from the admission made of record that the lots must be conveyed subject to the restrictions named.

So without discussing other questions raised, we will affirm the decree upon this ground. We are somewhat at a loss to know why this defense was not distinctly made in the answer, but there was evidence on the subject, which was not excepted to, and being thus brought to the attention of the Court, the contract should not be enforced by a Court of Equity.

Decree affirmed, appellants to pay the costs, above and below.

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NICHOLAS A. REITER vs. STATE OF MARYLAND.

Food—Statute Prohibiting Sale of Condensed Skimmed Milk.

Code, Art. 27, Sec. 235 (Act of 1900, Chap. 532), provides that no condensed or preserved milk shall be manufactured or sold unless it be made from pure milk, from which the cream has not been removed either wholly or in part, nor unless it contain a designated proportion of milk solids. *Held*, that this statute prohibits the sale of a product labelled as condensed skimmed milk, made from milk from which the greater part of the cream had been taken, although such product, manufactured in this manner, was not known when the Act of 1900 was passed, and although Code, Art. 27, Sec. 233, authorizes the sale of skimmed milk when sold as such. The object of the statute is not to prevent fraud or imposition, but to prohibit the sale of an article deemed by the Legislature to be lacking in some of the qualities of healthy food, and hence it makes no difference that the article is not sold as condensed milk, but as condensed skimmed milk.

Decided January 15th, 1909.

Appeal from the Criminal Court of Baltimore City (Dobler, J.)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

Arthur Geo. Brown and *R. E. Lee Marshall*, for the appellant.

Isaac Lobe Straus, Attorney-General, and *Eugene O'Dunne*, Deputy State's Attorney (with whom was *J. Wallace Bryan* on the brief), for the appellee.

THOMAS, J., delivered the opinion of the Court.

Section 235, of Art. 27 of the Code (Act of 1900, Ch. 532, Sec. 138 F.), provides that "No condensed or preserved milk shall be manufactured, sold or exchanged, or offered or exposed for sale or exchange, unless the same be manufactured from or out of pure, clean, healthy, fresh, unadulterated and wholesome milk from which the cream has not been removed either wholly or in part, or unless the proportion of milk solids of same shall be in quantity the equivalent of twelve and fifty one-hundredths per centum of milk solids in crude milk, and of which mild solids three and fifty one-hundredths per centum shall be butter fats. No person shall manufacture, sell or exchange, or offer or expose for sale or exchange any condensed or preserved milk unless the same be put up, packed or contained in packages with the name of the manufacturer of the said milk distinctly branded or stamped thereon."

The appellant, Nicholas Reiter, of Baltimore City, was indicted under this section of the Code for having unlawfully sold, offered for sale and exposed for sale condensed and preserved milk, which had been manufactured from and out of milk which was not then and there pure, clean, healthy, fresh, unadulterated and wholesome, and from milk from which the cream had been theretofore removed. The indictment contains five counts, charging in different language the same offense, and to this indictment the defendant filed the following plea:

"And now comes the said Nicholas Reiter and says that the State ought not further to prosecute the said indictment nor any one of the counts thereof, and for plea to each of said counts says that he is a citizen of the State of Maryland and a resident of the City of Baltimore, and that he was at the times mentioned in said indictment, since he has been and now is regularly engaged in carrying on wholesale and retail grocery business, in the city aforesaid, under the firm name of Nich. Reiter & Co., said firm being a co-partnership and

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composed of the co-partners as follows, to wit: Nicholas Reiter and Ambrose J. Reiter.

"That in the conduct of said business, said firm regularly had and kept in stock, and offered for sale and exposed for sale certain cans marked and labelled in manner and form as follows, to wit:

SKIMMED
SQUARE H BRAND
CONDENSED
MILK.

"That the said cans so marked and labelled as aforesaid contained in a condensed or solid form a certain product of pure cow's milk, commonly known in commerce and in trade as 'skimmed milk condensed' or 'condensed skimmed milk.'

"That the said condensed skimmed milk contained in said cans, as aforesaid, was and is pure skimmed milk from which a considerable portion of the water has been removed by process of evaporation, and the said skimmed milk was and is obtained from pure cows' milk by removing therefrom all, or the greater part of, the cream contained therein.

"That all the milk used to make the skimmed milk so condensed in said cans as aforesaid, was and is pure, clean, healthy, fresh, unadulterated and wholesome milk within the meaning and intent of the laws of the State of Maryland, and in order to produce the said skimmed milk which was and is used to make the condensed skimmed milk manufactured and sold as the 'Square Brand Condensed Skimmed Milk' as aforesaid, the manufacturer and proprietor of said brand merely removed and removes the cream from the aforesaid pure, wholesome and unadulterated milk by a mechanical process and device known as centrifugal separation.

"That after and in consequence of the removal of the cream as aforesaid, a product of milk was and is thereby obtained which was and is recognized and classified as an article of food consumption known and designated as skimmed milk, and the said skimmed milk so produced, as aforesaid,

was and is pure skimmed milk within the meaning and intent of the laws of the State of Maryland.

"That as a necessary result of removing the cream from the said milk, as aforesaid, all or the greater part of the butter fat was and is likewise removed from said milk, so that skimmed milk contains little or no butter fat, and the skimmed milk sold by the traverser as 'Square Brand Condensed Skimmed Milk,' as in said indictment charged, contained not more than one per cent. of butter fat.

"That after obtaining pure skimmed milk by separating and removing the cream from pure milk as aforesaid, the said pure skimmed milk was and is condensed by evaporating therefrom a considerable quantity of its water fluid, and certain proportion of pure cane sugar was and is added thereto for the purpose of preserving and keeping the same pure. That so prepared and produced as aforesaid, the skimmed milk condensed or condensed skimmed milk was and is put up in cans and sold to the trade and to the public generally as 'Square Brand Condensed Skimmed Milk.' That the product of milk commonly known as 'condensed milk' is classified and defined in science and in trade as pure milk from which a considerable quantity of water has been evaporated and to which sugar has been added, and the product of milk known as 'condensed skimmed milk' is classified and defined in Science and in trade as skimmed milk from which a considerable portion of water has been evaporated and to which sugar has been added.

"That the can of condensed skimmed milk sold by the traverser as in said indictment charged was sold by the defendant on the nineteenth day of August, 1908, to Charles Knell, in response to a request for a can of condensed milk square brand, and the contents of said can was condensed skimmed milk manufactured and produced from pure skimmed milk as aforesaid, and plainly and conspicuously labelled and marked as condensed skimmed milk, with letters ranging in size from approximately three-quarters of an inch square to one-half of an inch square, and the skimmed milk

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condensed in said can contained the following constituents, to wit: 74.90% of total solids; 1.68% of ash; 12.24% of milk sugar; butter fat less than 1.10 of 1%; proteids, 15.95%; cane sugar, 45.03%.

"That the process of condensing skimmed milk in cans was first perfected and the manufacture and sale of condensed skimmed milk in cans, as an article of commerce and a food product, was first begun in or about the year 1907, and prior to that time skimmed milk was not condensed and preserved for sale in small cans as aforesaid. All of which the said Nicholas Reiter is ready to verify.

"Wherefore the defendant prays judgment and that by the Court here he may be dismissed and discharged from the premises specified and contained in each of the said counts of the indictment."

This plea was demurred to by the State, and the demurrer having been sustained, the traverser pleaded not guilty, was tried, convicted and sentenced to pay a fine of \$25.00. The only question presented by the record arises on the ruling of the Court on the demurrer to defendant's plea.

The contention of the appellant is that "condensed skimmed milk," manufactured as set out in the plea, is a definite and distinct product of milk, and so recognized and classified in science and trade; that it is a valuable food product which was not known when the Act of 1900 was passed, and that it is therefore not covered by Section 235 of the Code.

The plea admits that the condensed skimmed milk sold by the appellant was manufactured from milk from which the greater part of the cream had been removed, but the appellant insists that it is only the manufacture of condensed *milk* from milk from which the cream has been removed that is prohibited by the statute, and not condensed *skimmed milk*, as that product was not known at the time of the passage of the Act.

A glance at Section 235 shows that the intention of the Legislature was not only to prevent fraud and deception from being practiced on consumers of condensed milk, by prohibit-

ing the sale of any product of milk, not manufactured from milk of the quality required, under the name of condensed milk, but to absolutely prohibit the sale of condensed milk manufactured out of milk not possessing all the qualities required by the statute. This section does not say that condensed milk of the kind prohibited shall not be sold *unless* marked and branded as provided, but requires, as one of the means of preventing the sale of condensed milk prohibited by the section, that it shall be packed in the way provided, with the name of the manufacturer stamped thereon. In other words, the primary object of this legislation was not to prevent fraud and imposition, but to prohibit the sale of an article deemed by the Legislature either injurious to health, or lacking some of the qualities of healthy food.

If the language of the Act is broad enough to include condensed skimmed milk, there is no force in the contention that the Legislature could not have intended the Act to apply to condensed skimmed milk simply because it is an article of food not then known, as the Legislature may unwittingly have prohibited the sale of an article of which it had no knowledge, or have purposely included in the prohibition an article known to it, but as to the value of which as an article of food, it was not then fully advised.

It would seem, however, from the other legislation in reference to the sale of milk that the Legislature treated the regulations in regard to milk as including skimmed milk. Sec. 233 of the Code, after declaring what milk shall be deemed sophisticated, adulterated or unwholesome, including milk "from which a portion of the cream has been taken," provides "but nothing in these sections shall be construed as prohibiting the addition of sugar in the manufacture of condensed or preserved milk, or to prohibit the sale of pure skimmed milk, when sold as such, and from cans plainly and conspicuously marked with sign or placard 'Skimmed Milk' in capital letters each of a size not less than one inch square." The obvious meaning of that section is that milk from which a portion of the cream has been taken, or skimmed milk, is

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“sophisticated, adulterated or unwholesome” milk, and cannot be sold except in the way provided by the section. So when, by Sec. 235, the Legislature provided that no condensed or preserved milk should be manufactured or sold, unless the same be manufactured from milk “from which the cream has not been removed either wholly or in part,” it meant that no condensed or preserved milk, manufactured from *skimmed milk* should be sold, etc.

Now the plea admits that the article sold, called “condensed skimmed milk,” was manufactured from milk from which the cream had been removed, or from skimmed milk, and unless we hold that the sole purpose of Sec. 235 was to prevent fraud and imposition upon the consumers of condensed milk, by the sale of other articles or products under the name of condensed milk, and that the Legislature did not intend to prevent the sale of articles manufactured from impure or unwholesome milk unless labelled and sold as condensed milk, it seems that the condensed skimmed milk offered for sale and sold by the appellant, clearly falls within the prohibition of the Statute, the plain object of which was, in connection with Secs. 232, 233 and 234, to prevent the sale of impure and unwholesome milk, including skimmed milk, whether sold as liquid milk or condensed milk, unless sold under the restrictions specially provided.

It is true that, in one sense, condensed *skimmed milk* is not *condensed milk*, nor is *skimmed milk*, in the same sense, *milk*, but it would require a narrow and unreasonable construction of these several sections of the Code, to hold that while they declare skimmed milk, that is, milk from which the cream has been taken, *impure milk*, and prohibit the sale of it except under the conditions provided, yet by taking a “considerable quantity of water fluid” from it, and adding to it cane sugar, it can be sold *without any restrictions whatever*, notwithstanding the express provision that no condensed milk shall be sold that is manufactured from *milk from which the cream has been removed*.

That the term "milk" may include in its general meaning milk that is not of the quality required by the Code, is illustrated in Sec. 233, where milk from which the cream has been taken, that is skimmed milk, is excepted, and allowed to be sold in a certain way.

In the case of *Commonwealth v. Gordon*, 159 Mass. 8, 33 N. E. Rep. 709, the Court held that "The word 'milk,' in *Pub. St.*, c. 57, 'of the inspection and sale of milk,' is shown by Section 71 to include milk from which no part of the cream has been removed, and we are of opinion that it is used as a general name, and in a sense broad enough to include cream. The offense, under Section 5, of having in one's possession, with intent to sell, milk to which a foreign subject has been added, is committed by having with that intent cream to which boracic acid has been added." 1 *Cyc.* 945, Note 25.

In the case of *Commonwealth v. Smith*, 149 Mass. 9, 20 N. E. Rep. 161, the Court said: "The complaint is for selling milk not of the standard quality of pure milk; that is, milk containing less than thirteen per cent. of milk solids. The defendant had a right to sell skimmed milk, which is not of the standard quality of pure milk, from cans marked in a certain manner. If he sold milk not of the standard quality of pure milk, and not sold as skimmed milk from duly-marked vessels, he would be liable on this complaint."

Under a statute declaring that milk from which the cream has been removed is impure milk, and prohibiting the sale of impure milk, it would not be a sufficient answer to the charge of violating the statute, to say that the article sold was skimmed milk; so under the sections of the Code referred to, prohibiting the sale of impure condensed milk, that is condensed milk manufactured from milk from which the cream has been removed, as indictment charging the sale of impure condensed milk cannot be effectively met by the plea that the article sold was "*condensed skimmed milk.*"

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We cannot, therefore, accept the view earnestly pressed by the learned counsel for the appellant, but, concurring in the conclusions reached by the Court below, must affirm the judgment.

Judgment affirmed with costs.

RICHARD D. FISHER vs. MABEL WAGNER ET AL.

*Devise and Legacy—Contingent Remainder May Be Devised
When Limited to Designated Person—Construction
of Residuary Clause.*

When a contingent remainder after a life estate is limited to a person who is definitely described, it may be devised by him, although he dies before the happening of the contingency which is to vest the estate in him.

When a testator disposes by a residuary clause of "all the rest and residue of my estate, real, personal and mixed of which I may die possessed," and there is no apparent intention on his part to die intestate as to any property which he could bequeath, then a contingent remainder limited to him after an existing life estate passes under the residuary clause.

A testator devised property to be held in trust for his daughter Aminta during her life, with remainder to her children, and in case she should die without leaving a child or descendants, he gave one-third part thereof to his son Robert, his heirs, personal representatives and assigns, absolutely. Robert died in 1881, leaving a will disposing of all of his estate. The daughter Aminta died in 1908 without issue. *Held*, that the contingent remainder given to Robert in the event of the death of Aminta without leaving issue, passed under his will and that his legatees are entitled to the same to the exclusion of his next of kin.

Decided January 13th, 1909.

Appeal from the Circuit Court of Baltimore City (HEUSLER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON and HENRY, JJ.

Randolph Barton and James M. Ambler, for the appellant.

Joseph Packard, for the appellees.

BOYD, C. J., delivered the opinion of the Court.

Richard D. Fisher, in his own right, as executor of Robert A. Fisher and as administrator of the estate of Samuel W. Fisher filed a petition asking the Court to ascertain and declare the true meaning and effect of the will of Robert A. Fisher, and to guide and direct him in the administration and distribution of the fund referred to in the petition. The questions for our determination arise in this way: James I. Fisher, by his will, dated November 13th, 1866, and admitted to probate August 14th, 1877, directed that, after setting aside his wife's dower and thirds, the residue of his estate should be divided equally among his four children, Robert A., Richard D., Aminta E., who afterwards married Charles Green, and Mary M. Wagner, but provided that the shares of his two daughters should be held *in trust* for them for life, with remainder to their children. Mrs. Wagner died several years ago, leaving four children who are of age and are parties to this proceeding, and Mrs. Green died on the 16th day of March, 1908, without leaving issue.

The portion of the will of James I. Fisher material to this case is as follows: "But in case my said daughter, Aminta E., shall depart this life without leaving a child or children, or descendant or descendants of a child of hers, living at the time of her death, or in case she should leave a child or children, or descendant or descendants thereof, living at her decease, and such child or children and descendant or descendants shall all subsequently depart this life under twenty-one

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years of age and without issue living at the time of his, her or their respective deaths, then in trust that the said last mentioned one-fourth part or share of the said rest, residue and remainder of my estate and property aforesaid shall be disposed of in manner following: One equal third part thereof shall go to and I do hereby give, devise and bequeath the same to my son, Robert A. Fisher, above named, his heirs, executors, administrators and assigns, absolutely and forever," etc.

Robert A. Fisher, after leaving to his wife, Emily P. Fisher, all the household furniture and plate of which he might die possessed, disposed of his estate by will dated February 3rd, 1877, as will be hereafter shown. He died on the 4th day of February, 1881, without leaving children, and his wife, whom he married in 1871, died in 1893. When he made his will he was forty-four years of age, had some property in his own right and his father, who was then nearly eighty years of age possessed an estate of about half a million dollars. His wife was ten years his junior and to use the language of the petition, "although the only issue of their marriage so far had been an infant, whose premature birth, in April, 1873, cut short its chance of life, he and his wife were both in good health and still in the prime of life, and there was no reason to anticipate that they would have no other children for whom to make provision in his will." James I Fisher, his father, died on July 30th, 1877, and Robert A. served with Richard D. and their mother as one of the executors of and trustees under James I. Fisher's will, and was familiar with its provisions, including that creating the trust for the benefit of Aminta E. Green. The only child of Mrs. Green, which was born in December, 1871, died on March 28th, 1878, having never shown any promise of health or strength. At the time of its death, Mrs. Green had been married nearly nine years, was in the forty-third year of her age, while her husband was then seventy years old, and the petition alleges that Robert A. Fisher therefore knew for some time before his own death that "one-third of the remainder

after his said sister's life estate under her father's will was for all practical purposes sure to come ultimately to him or his representatives." The Safe Deposit and Trust Company of Baltimore was substituted as trustee in place of Mr. Richard D. Fisher, and now has a fund in hand ready for distribution.

The appellees contend: (1) That the interest in the contingent remainder created by the will of James I. Fisher, above quoted, which would have been taken by Robert A. Fisher, if he had survived the happening of the contingency, could not pass by any will made by him; and (2) That if it could, the language used by him in his will was not adequate to transmit this interest. If the views of the appellants are correct, the fund will go to the children of Richard D. Fisher, while if those of the appellees prevail, one half will go to him and the other half to the children of Mrs. Wagner. The latter are the appellees—the Court below having determined by its decree: "That no interest in the contingent remainder limited in the will of James I. Fisher upon the death of Aminta E. Green, passed under the will of Robert A. Fisher, and that he died intestate thereof, and the same vested in the next of kin of said Robert A. Fisher living at the death of said Aminta E. Green."

The answer of the appellees admits the facts alleged in the petition, but the inferences sought to be drawn from those alleged in paragraphs four and five and the argument based thereon they leave to the judgment of the Court. It is proper to say that the proceeding is entirely friendly and the respective parties seem to be wholly free from those feelings which so often exist, and are sometimes made manifest by the record, in cases involving controversies over estates, although the arguments of counsel were exceptionally able, and the rights of the parties under the law fully and thoroughly presented according to their respective contentions.

As there was no appeal from the decree of August 3rd, 1908, declaring that Stanley K. Green has not "by virtue of being the adopted son of Aminta E. Green, any right, title

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or interest as one of the next of kin or heirs at law of Robert A. Fisher, brother of the said Aminta E. Green, in or to any part of the property now held" by the trustees, we are not called upon to pass on that, but would add that as the Act of 1892, which provided for the adoption of children in Maryland and giving such adopted children certain rights, was passed some years after the death of James I. Fisher, there would seem to be no doubt that Stanley K. Green was correctly advised, as he in effect stated in his answer, that he was not entitled to any interest in the fund in controversy.

1. As Mrs. Green died without leaving any issue, if Robert A. Fisher had survived her, he would undoubtedly have taken a share in the remainder left Mrs. Green, under the clause of his father's will above quoted, but the question is whether he had such an estate, right or interest in that share as he could dispose of by will. The contingency attached to his taking it did not in any way relate to his capacity to take, and there was no contingency as to who was to take, but Robert A. Fisher was distinctly named as the one. The learned counsel for the appellees argued that the distinction made by some authorities between the case of a person designated to take a remainder upon the happening of a future contingency and that of persons who belong to a class which is to take in the same event is highly artificial. Such distinction, however, has not only been recognized in this State, but it seems to us to be a logical one. If a testator names a *person* who is to take upon the happening of a contingency, it is altogether different from naming a *class* of persons who are to take. If, for example, he names A. as the object of his bounty, on the happening of a certain contingency, it is known who is to so take, but if he leaves his estate, upon the happening of a contingency, to the survivor of B., C. and D., or to such of the children of A. as may then be living, it cannot be said in advance who will take, if the contingency happens.

It does not seem to be altogether logical to say that Robert A. Fisher had no interest because he died before the happen-

ing of the contingency, but that his heirs or next of kin, *as such*, can take. Independent of statute, if a legatee or devisee named in a will dies before the testator, his heirs or next of kin would not take, and the devise or the legacy would lapse, because he did not live until the time when such devise or legacy would be effective, and so it would seem to be logical that if he took nothing because he died before the contingency happened, that the heirs or next of kin ought not to take. In 1 *Roper on Legacies*, ch. 10, sec. 4, page 596, after stating that if the substituted legatee dies before the contingency happens, upon which he is to succeed to a legacy, his representative will be entitled to it so soon as the event takes place, it is said: "Suppose, then, a bequest be made to A., but if A. died under twenty-one, or without leaving issue or children, to B., although B. happened to die before A., B.'s personal representative would be entitled to receive the legacy upon the happening of the contingency, *on the ground of its being vested in right in B. previously to his decease*," and there are many other authorities to the same effect.

But as the counsel for the respective parties differ as to the construction of some of the decisions of this Court, and as there may be some apparent, although not, in our judgment, real, conflict between some of those decisions, it will be well to review them at some length. In *Snively v. Beavans*, 1 Md. 208, the will gave to Mrs. Watkins certain lands for her life, and at her death to go to two sons. In the event of the sons' death without issue before their mother, she was to have the power of disposing of all she took under the will, and it provided: "I will and devise, in the event of the death of my sons, Thomas and Edgar, before they are twenty-one years of age, that my brother, Greenbury M. Watkins, shall have their whole estate, by paying to my wife Ellen one thousand dollars." It was said by the Court: "It is well settled, that an executory interest of this kind is transmissible, and will go to the representative of the legatee, if he dies before the contingency happens. 2 *Fearne on Rem.* 529. It is a contingent interest which vests in right, though not in posses-

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sion." Again it was there said: "If Greenbury M. Watkins had died before the sons, his contingent interest in their estate would have passed to his representatives, to be enjoyed if the contingency happened."

In *Hambleton v. Darrington*, 36 Md. 434, Mrs. Watson devised and bequeathed all the residue of her estate to Zachariah Woollen, in trust, to pay to her mother, sister and brothers certain annuities, and the residue of her income to her son Henry for life, and upon certain contingencies (among others, his living after his sister ceased to be single, or leaving issue) she devised to him, his heirs, executors and administrators, absolutely, not only the income but also the entire principal of the rest, residue and remainder of her estate, with this proviso: "But in case of the decease of my son Henry before my said sister ceases to be single, or if my two brothers above named, or either of them, survives him, then in case my said son shall not have issue or descendants, I give, devise and bequeath to my said friend, Zachariah Woollen, his heirs, executors, administrators and assigns absolutely, not only the income of my estate, above intended for my said son, but also the entire principal of said rest, residue and remainder of my estate." Zachariah Woollen died before Henry Watson, but after he (Woollen) had made a will. This Court held that he took a descendible and devisable estate, and in the opinion made the following quotations: "'All estates which are transmissible, either by operation of law or by act of owner, are held devisable. This, it has been long held, extends to a possibility, if it is not a mere naked expectancy, but be coupled with an interest.' *Redfield on Wills*, part 1, pp. 388, 389; *Fearne on Con. Rem.* 371. 'All contingent estates of inheritance, as well as springing and executory uses and possibilities, coupled with an interest, *where the person to take is certain*, are transmissible by descent, and are devisable.' 4 *Kent's Com.* 261. 'Where the testator bequeaths his personal estate to A., and if he shall die without issue to B., there is such a vested interest in B., if he survive the testator, that although he should die in the lifetime of A., the

estate will pass under a devise from him, or will go to his personal representatives, in the event of A. dying without issue.' *Barnes v. Allen*, 1 Browne C. C. 181; *Perry v. Woods*, 3 Ves. 204, 208; 2*Redfield on Wills*, p. 627, Sec. 51." That case is exactly in point, and unless overruled, which we will consider later, is the law of this State.

In *Buck v. Lantz*, 49 Md. 439, there was a deed of trust, which conveyed real and personal property to a trustee, in trust, for the use of the grantor during her life and after her death for the use of her daughter, Margaret Buck, during her life and after her death, then in trust as to the remainder for such child or children of the daughter as she might leave, but if the daughter died without leaving descendants surviving her, then in trust to convey the remainder to Mary Harwood, a sister of the grantor. The sister survived the grantor, but died before the daughter, who afterwards died unmarried and without issue, having made a will by which she devised and bequeathed all the property to which she might be entitled at the time of her death to her aunt. It was held that the limitation over of the remainder to the sister of the grantor, after the death of the daughter, without leaving descendants surviving her, was a contingent remainder, which passed upon the death of the sister to her heirs, in whom it became vested upon the happening of the contingency.

It is contended by the appellees that this is one of the cases which overruled *Hambleton v. Darrington*, *supra*, but we do not so understand it. It is true the Court said: "If Mary Harwood had outlived Margaret Buck, the younger, there is no doubt that the contingent remainder, thus limited, would have become an absolute estate vested in her, immediately upon Margaret's death without issue living at that time. But Mary Harwood having died during the lifetime of the tenant for life, so that the estate could not vest in her, it is contended that her heirs have no title to the estate." But the Court went on to quote from 4 *Kent's Com.* 262, that "Contingent and executory, as well as vested interests, pass to the real and personal representatives according to the nature of the inter-

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est, and entitle the representatives to them, when the contingency happens;" and again from *Barnitz Lessee v. Casey*, 7 Cranch, 469, that: "It is very clear that contingent remainders and executory devises at common law are transmissible to the heirs of the party to whom they are limited, if he chance to die before the contingency happens." It was not necessary in that case to determine whether they were devisable, for Mary Harwood had made no will, but the Court did not say, or intimate, that such estates as are transmissible are not devisable, as had been held in *Hambleton v. Darrington*. Our testamentary laws provide that any lands, etc., which can be conveyed, or descend to or devolve upon heirs, or other representatives, and all personal property which might pass by deed, etc., can be disposed of by will, and hence it might be argued from them that an estate which is transmissible is devisable.

In discussing the question who were the heirs of Mary Harwood entitled to the estate, the Court said: "It is clear that those only can take who were *in esse* at the time *when the contingency happened* and the estate fell into possession. That did not occur until after the death of Margaret Buck. She could not, therefore, be heir, or take or transmit any interest in the estate by will or otherwise." But that does not reach the question in this case. The rule is, that only the heirs of the contingent remainderman who are *in esse* when the contingency happens and the estate falls into possession can take, and as Margaret Buck was not then *in esse*, she was not an heir, and, of course, she could not take, or transmit any interest in the estate by will or otherwise, but that does not affect the other rule that an estate which is transmissible is devisable. That clearly means devisable by the designated remainderman, and it does not mean that it is devisable after the contingency happens, for then it is no longer a remainder, but has become the absolute property of the remainderman—unless, of course, there be some other provision in the instrument creating it which may affect it. JUDGE GRASON delivered the opinion in *Buck v. Lantz*, and sat in *Hambleton v.*

Darrington, and JUDGES BARTOL, MILLER and ALVEY sat in both cases. Surely, if they had intended to overrule *Hambleton v. Darrington*, they would have said so.

In *Demill v. Reid*, 71 Md. 175, the testator devised real estate to his son in trust, for the use and benefit of his grandson for life, and from and after the decease of the grandson, then in trust for the child or children of the grandson if he left any, but if he died without leaving a descendant, or if he left descendants who subsequently died under lawful age and without issue, then to the children of the testator's son. The Court held that the will "created a contingent remainder, with a double aspect, and not an executory devise," and "where there is an ultimate limitation upon a contingency to a class of persons plainly described, and there are persons answering the description *in esse* when the contingency happens, they alone can take."

The testator died in 1860, the grandson died in 1866, without leaving issue, and the son had died in 1887. The son had six children three of whom were living at the time the case was heard, one died in 1875, intestate and leaving no descendants, another died in the lifetime of her father, leaving an only child who also died in the lifetime of the father, leaving no issue, and the other died in 1874 leaving four daughters who were still living. The question was whether those four daughters took the interest which their mother would have taken had she survived the life tenant, or did it all go to the three children of the son who did survive the life tenant? The Court said: "As a general rule, a contingent remainder of inheritance is transmissible to the heirs of the *person* to whom it is limited, if such person chance to die before the contingency happens," referring to *Fearne*, 364. JUDGE MILLER then quoted from 4 *Kent's Com.*, 261, that "it is settled that all contingent estates of inheritance, as well as springing and executory uses, and possibilities coupled with an interest, "*where* the person to take is certain, are transmissible by descent, and are devisable and assignable." The Court referred to the fact that the doctrine was vigor-

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ously criticised by Mr. Bingham in his book on descents, but said it had been recognized by this Court in several cases by which the Court felt bound, and added: "The rule by its terms applies where the person to take is certain; that is, where an individual is named or definitely described as the party to take when the contingency happens; and of this the case of *Hambleton v. Darrington*, 36 Md. 435, affords an illustration. Of like character are the other Maryland cases to which reference has been made. *Snively v. Beavens et al*, 1 Md. 208; *Buck v. Lantz*, 49 Md. 444." The Court then put this inquiry: "Now does this rule apply to a case where there is a limitation by way of contingent remainder to *children* as a class, and where there are those of the class answering the description, and capable of taking at the time the contingency happens and the estate arises and becomes vested," and held that the expression "'children of the testator's son' did not include the issue of a child in being at the death of the testator, but who died before the happening of the contingency." This case therefore clearly recognized the rule that *where the person to take is certain*, contingent estates of inheritance, as well as springing and executory uses, etc., are transmissible by descent, and are devisable and assignable, and that too in a case in which it was considering a will which created a contingent remainder with a double aspect—where there were "two contingent fees not limited to take effect the one upon or after the other, but the one to take effect to the entire exclusion of the other, and the falling out of the contingency is to decide which of the two is to take effect." It further clearly recognized the distinction between a case where *an individual is named, or definitely described* as the party to take, and one where there is a limitation to a *class*, and it also demonstrated that *Hambleton v. Darrington*, was not overruled by *Buck v. Lantz*, by citing it as an illustration of the rule above stated, and also citing *Buck v. Lantz*.

The case of *Larmour v. Rich*, 71 Md. 369, throws no light on the subject. The Court held that by the terms of that will the remainder given to the children of the testator's daughter

did not vest until the death of the parent. In *Reid v. Walback*, 75 Md. 217, it was again said "Contingent estates of inheritance will pass by descent and are also devisable," citing *Spence v. Robbins*, 6 G. & J. 513, and *Hambleton v. Darrington*, *supra*. Nor does *Garrison v. Hill*, 79 Md. 75, affect the question. There, as in *Buck v. Lantz*, the will under discussion was that of the life tenant and not of the contingent remainderman. As the remainderman died before the contingency happened, without leaving a will, under the rule above referred to, only such heirs could take as were *in esse* when the contingency happened, and as it happened at the time of the death of the testatrix, of course she was not an heir, and she could not dispose of the remainder by her will. The rule which declares that contingent estates of inheritance will pass by descent and are also devisable (which is again announced in *Garrison v. Hill*) means that they are devisable by the contingent remainderman, as we have seen, but of course his will does not take effect on such remainder until the happening of the contingency. If it does happen, and he has willed it, then his devisee takes the interest he would have had if he had been then living. That is clearly the meaning of the cases on the subject.

Great reliance is placed by the appellees on *Lee v. O'Donnell*, 95 Md. 538, and it is contended that it overruled *Hambleton v. Darrington*. In the first place, it might be said that this Court would not intentionally overrule a case, especially one which would affect title to property, without even mentioning it, but there was not only no such intention, but in our judgment it does not in any way have such effect. After stating the facts fully, and the contention of the widow and administratrix of Louis Courtney O'Donnell, who was one of three grandchildren named by the testator as contingent remaindermen, the Court said: "The obvious answer to this contention is, that according to the clearly expressed intention of the testator, the estate did not vest, or become the property of Louis Courtney O'Donnell, her husband, who died intestate on May 27th, 1885, until

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the death of the life tenant, Oliver O'Donnell, who did not die until the 13th of November, 1901." Then after quoting the part of the will which made the trust for the benefit of his grandson, Oliver O'Donnell, during his life, and referring to the provision for the remainder which began by saying: "and from and immediately after the decease of my said grandson, Oliver O'Donnell, in trust," etc., the opinion proceeded: "Here the use of the words 'from and immediately after the death' taken in connection with the other parts of the will fixed the period or point of time with reasonable certainty, at which the estate should vest and become the property of his other grandchildren. The testator plainly states the contingency which shall first happen before the property should take effect and vest in the grandchildren named in the will, and that was the death of Oliver O'Donnell, without issue. The husband of the appellant, Nina O'Donnell, having died in the lifetime of the life tenant before the time fixed for the contingent remainder to vest in him (she) is not therefore entitled to share in the distribution of his property under the 16th article of the will, either in her right as widow or as his administratrix," citing *Larmour v. Rich*, 71 Md. 384; *Cox v. Handy*, 78 Md. 108; and *Nowland v. Welch*, 88 Md. 51. The Court then considered the remaining question, whether the trust created by the will terminated at the death of the life tenant. It is obvious that the opinion was based on the construction of the will, which the Court held showed the intention of the testator to be that the contingent remainderman should not take until after the death of the life tenant — relying on the language quoted above, taken in connection with other parts of the will.

There is another part of the will that strongly sustains the conclusion reached. It is that part which provided that in the event of the death of any of the three grandchildren under twenty-one years of age, and without issue, the "share of him or her or them so dying shall go to and become the property of the survivors or survivor of them absolutely," etc., and in case all three of them died under twenty-one and

without leaving issue, then the will provided that the said share "shall go to and become the estate and property of all my other children then living and all the descendants or descendant then living of such of them as may be then dead," etc. It was therefore impossible to tell until the death of the life tenant who was to take—consequently the person to take was not certain, and hence the rule as announced in *Hambleton v. Darrington*, and followed in *Demill v. Reid*, and other cases did not apply. That was sufficient to prevent the widow and administratrix from being entitled to share in the interest which would have gone to Louis Courtney O'Donnell, if he had been living at the death of the life tenant. Then again, Louis Courtney O'Donnell did not make a will and hence, as decided in *Buck v. Lantz*, only such as were his heirs *in esse* at the time of the happening of the contingency could take. His daughter, Louisa Courtney O'Donnell, was his only heir, and, as such, she did take what her father would have taken if he had survived Oliver O'Donnell.

There is certainly nothing in *Reilly v. Bristow*, 105 Md. 326, which in any way conflicts with what we have said, or that can be said to sustain the construction placed on *Lee v. O'Donnell*, by the appellees. On the contrary, it tends to sustain the position contended for by the appellants, although it is not necessary now to determine whether it went to the extent the appellants contend for it.

We have thus at such great length reviewed many of our own decisions because there seemed to be some misapprehension as to the law on the subject before us in this State. Our conclusions are that *Hambleton v. Darrington*, has not been overruled by this Court, and that Robert A. Fisher took a transmissible and devisable estate under the will of his father, as the person to take was certain, and there was nothing in the will of James I. Fisher which indicated his intention that such interest or right as a contingent remainderman may have, before the happening of the contingency, should be postponed until the death of the life tenant. It is proper to add

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that the whole will is not before us, but we assume that if there had been anything in it affecting the question it would have been inserted in the record.

We will not further discuss authorities outside of the State, but will cite some not already mentioned, which more or less reflect upon the questions before us. 2 *Wash. on Real Prop.* (6th Ed.), section 1557; 2 *Minor's Inst.*, 361; 2 *Williams on Executors*, 888, 889; *Pinbury v. Elkin*, 1 P. Williams, 564; *Peck v. Parrot*, 1 Ves. Sr. 236; *Robertson v. Fleming*, 57 N. C. 387; *Heard v. Read*, 169 Mass. 216; *Loring v. Arnold*, 15 R. I. 428; *Chess' Appeal*, 87 Pa. St. 362; *Hennessy v. Patterson*, 85 N. Y. 91; *Dunn v. Sargent*, 101 Mass. 336; and *Collins v. Smith*, 105 Ga. 525 (S. C. 31 S. E. Rep. 449). In this last case a number of authorities are cited.

(2) The next question is whether the language used in the will of Robert A. Fisher was sufficient to, and did include, this remainder. After giving to his wife certain household furniture and plate he made this bequest: "I give, devise and bequeath unto my brother, Richard D. Fisher, all the rest and residue of my estate, real, personal and mixed, of which I may die possessed, in trust," etc. That expression was certainly broad enough to include all that he could devise and bequeath, unless the words "of which I may die possessed," so qualify the rest of the clause as to prevent this remainder from passing. There is nothing else in the will, or circumstances surrounding it, which would indicate an intention on the part of the testator to die intestate as to any property he could devise or bequeath, but the contrary is manifested. It was said in *Barnum v. Barnum*, 42 Md. 311: "There is always a strong disposition in the Courts to construe a residuary clause so as to prevent an intestacy with regard to any part of the testator's estate, unless there is an apparent intention to the contrary," and the Court referred to Sir William Grant's statement that "it must be a very peculiar case indeed, in which there can at once be a residuary clause and a partial intestacy, unless some part of the residue be not well given." In *Dulany v. Middleton*, 72 Md. 76, JUDGE

ALVEY quoted from *Booth v. Booth*, 4 Ves. 407, that: "Every intendent is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property." As indicating the extent to which this Court has gone, even when the testator did not know he had the property which was involved, see *Stanard v. Barnum*, 51 Md. 451, *Dalrymple v. Gamble*, 68 Md. 523 and *Lindsay v. Wilson*. 103 Md. 252.

A number of cases reflecting upon the meaning of the term "of which I may die possessed" can be found in the books. In *Thomas v. Blair*, 111 La. 678, it was held that the expressions "all my property" and "all the property I possess" were equivalent; in *Brantley v. Kee*, 58 N. C. 332, "all the property I now possess" was held to mean all that the testator "owned," and therefore included estates in remainder; in *Loring v. Arnold*, 15 R. I. 428, "all interest and estate in all real estate in Rhode Island" passed a contingent remainder; in *Whitehead v. Gibbons*, 10 N. J. Eq. 230, all the rest and residue of my estate, real, personal and mixed, wherever it may be situated or found, that I may die possessed of," etc., held to embrace everything that the testator had a right to dispose of not specifically devised or bequeathed; in *Laughlin v. Norcross*, 97 Me. 33, by "all the estate, real, personal and mixed, wherever found, and however situated, whereof I die seized and possessed" it was held that "the testator evidently meant to include all kinds of rights that were transmissible." See also—*Cruger v. Heyward*, 2 Des. (S. C.) 422; *Heard v. Read*, 169 Mass. 216; *Collins v. Smith*, 105 Ga. 525; *Woodman v. Woodman*, 89 Me. 128; *Davenport v. Coltman*, 9 M. & W. 494; and *Hemingway v. Hemingway*, 22 Conn. 472. And in *Reilly v. Bristow*, *supra*, the estates of Annie N. Griffin and Frederick H. Griffin were not only not vested in possession, but such interests as they might have from their father's estate depended entirely upon a contingency which had not yet been determined when that case was heard, but this Court held that their wills would each pass either a third of the whole or a third of the

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two-thirds under discussion. Frederick's will was: "I devise and bequeath my estate, real and personal," but his sister's was: "I give, devise and bequeath all of my property of whatever kind I am possessed, real, personal or mixed," and whether their father died intestate as to any part of the remainder depended upon the contingency whether his three children left children.

We are, then, of the opinion that the expression "of which I may die possessed" did not limit the broad language of the testator used in that clause. Nor do we think that the rest of the will indicates an intention not to include such an interest as this. Several years before his death the testator had reason to believe that he would get the benefit of Mrs. Green's share, as he was presumably familiar with the terms of his father's will, and as he was making provisions for his wife and any child or children that he might leave, there is every reason to believe he intended to include everything he could dispose of by will. The mere authority given the trustee to "invest" his property, with power to change said investments, cannot be held to mean that he intended to exclude this remainder, because that could not in its then condition be invested by the trustee. The trust might have lasted years after the contingency happened.

We will reverse the decree, but will order the costs above and below to be paid out of the fund, as both sides have requested that to be done, whatever our conclusion might be.

Decree reversed, and cause remanded in order that a decree may be passed in accordance with this opinion, the costs, above and below, to be paid out of the fund remaining in the hands of the Safe Deposit and Trust Company of Baltimore, substituted Trustee.

WILLIAM MARTIEN ET AL. vs. THE MAYOR AND
CITY COUNCIL OF BALTIMORE.

Real Estate Broker's Right to Commissions—Sale Not Negotiated by Him—Evidence.

Municipal officers agreed to pay plaintiff, a real estate broker, certain commissions if he negotiated the purchase of land for the municipality. Plaintiff endeavored, without success, to obtain from the owner of the land desired by the city an offer or agreement to sell at a price acceptable to it. Afterwards the municipality announced its purpose to obtain the land by condemnation, and then the landowner agreed directly with the city to submit to arbitration the question of the price to be paid, and the city acquired the land upon the payment of the award of the arbitrators. In an action by the broker to recover commissions on the sale, *held*, that since the sale had not been effected as a result of his efforts or negotiations, he is not entitled to recover.

When the declaration sets forth the claim of the plaintiff as a real estate broker to recover commissions for effecting the purchase of certain land for the defendant, evidence is not admissible to show that the plaintiff rendered services in the purchase by the defendant of other lands.

Decided January 12th, 1909.

Appeal from the Superior Court of Baltimore City (ELLIOTT, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, BURKE, THOMAS and HENRY, JJ.

John Philip Hill, for the appellant.

Sylvan Hayes Lauchheimer (with whom was *Edgar Allan Poe* on the brief), for the appellee.

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THOMAS, J., delivered the opinion of the Court.

The declaration in this case charges that on or about the 17th of May, 1906, the defendant, the Mayor and City Council of Baltimore, through its agent, the Sewerage Commission of Baltimore, entered into a contract with the plaintiffs, "whereby the plaintiffs, who are real estate brokers, were employed to negotiate the purchases of certain lands lying near Back River, in Baltimore County, Maryland, and the plaintiffs were to receive from the defendant a commission of one and one-quarter per cent. of the aggregate amount of the defendant's purchases of the said land; less whatever the plaintiffs might be able to obtain from the vendors of such land in excess of one and one-quarter per cent. of the aggregate amount of defendant's purchases of said land; that the plaintiffs entered upon the performance of said contract and fully performed and discharged all their duties and obligations thereunder; that the aggregate amount of the purchases of said land by the defendant was \$205,000.00; that by reason of the purchases there became due and owing by the defendant to the plaintiffs the sum of \$2,562.50, but the defendant has not paid the same."

The defendant pleaded never promised as alleged, and never indebted as alleged; and during the trial of the case, which resulted in a verdict in favor of the plaintiffs for \$62.50, non pros, and judgment for defendant for costs, two exceptions were reserved by the plaintiffs, one to the rulings of the Court on the evidence, and the other to the action of the Court on the prayers, and on plaintiffs' special exception to defendant's sixth prayer.

The Court, by granting the defendant's first prayer, instructed the jury that there was no evidence in the case "legally sufficient under the pleadings to entitle the plaintiffs to recover any commission on the amount paid for the Willis lot, mentioned in the evidence," and unless there was error in granting this instruction, it will not be necessary for us to consider any of the other prayers in the case.

The Act of 1904, Ch. 349, provided for the appointment.

by the Mayor of Baltimore City, of a commission to be known as the Sewerage Commission of Baltimore City, who should have in charge the construction of a sewerage system for the City, with power to make, in the name of the Mayor and City Council of Baltimore, all contracts germane to the scope of its duties under the Act, and authorized the Mayor and City Council, acting by and through the agency of said commission, to acquire by purchase, gift or condemnation any land or property necessary for the construction or workings of such system.

The appellants, William Martien and James C. Martien, co-partners doing business under the firm name of William Martien & Co., real estate brokers of Baltimore City, knowing that the Sewerage Commission had to acquire a large lot or tract of land, needed in the construction of the proposed sewerage system, began, in the latter part of 1905 or early in 1906, to write to the Commission, making suggestions as to the character of the land in several directions from the City, which in their judgment would be desirable or suitable, and stating that they had for some time been taking an active interest in the sewerage work of Baltimore, and had collected a great deal of important data which would be useful and valuable to the Commission; that what they had done in the interest of the Commission had been done gratuitously, and tendering their services as real estate brokers whenever the Commission should decide to purchase. After having written a number of letters of the kind, on the 15th of May, 1906, General Leary, chairman of the Commission, wrote plaintiffs in reply that the Commission was not prepared at that time to enter into the purchase of real estate for the purpose of the Commission, but as soon as the Commission was informed of the recommendation of the advisory engineers the matter would be taken up by the Commission, and that he should be glad at that time to give the plaintiffs an interview on the subject.

James C. Martien, one of the plaintiffs, states that on the 16th of May, 1906, Mr. Hendrick, the engineer, called at

plaintiffs' office, and requested them to call at the Sewerage Commission's office that afternoon. That when they went to the Commission's office General Leary and Mr. Hendrick were there, and they awaited the arrival of the Mayor, Mr. Timanus; that while waiting for the Mayor they were questioned by General Leary regarding their business experience, and upon the arrival of the Mayor they were told that the Commission had decided to purchase a large tract of land; that it was a matter "that would have to be handled very expeditiously and only with the utmost confidence," and that it was a matter of vast importance to the Commission to acquire this land. They wanted to know if the plaintiffs could handle the matter without outside help, and upon being assured by the plaintiffs that they could, they wanted to know what commissions plaintiffs would charge, and the plaintiffs told them two and one-half per cent. commissions; that they said that it was a "matter of considerable magnitude, a deal of large proportions," that the land they wanted "contained about one square mile of territory," and that they thought that the commissions ought to be less, and requested the plaintiffs to name a lower rate. That plaintiffs told them that they were not willing to charge less than two and one-half per cent. but thought they could collect their commissions in a number of instances from the land owner; that they said to the plaintiffs that that would not be satisfactory, as the plaintiffs would then be representing the land owners, and they preferred plaintiffs to represent the City; that plaintiffs then told them that they thought they could render the City better service by seeking to collect their commissions from the land owners, that if they were "to go in to acquire a large tract of land and not make an attempt to collect a commission from the land owners, they would immediately suspicion some big corporation was behind the transaction, and their prices would be higher than if we attempted to collect commission from them." That the gentlemen representing the Commission then agreed that the plaintiffs should collect the commissions, if possible, from the land owners, and plaintiffs said they

would guarantee to collect at least fifty per cent. of the commissions from the land owners, if the City would pay the other fifty per cent., and the Commission agreed to that. That they then requested plaintiffs to reduce to writing the terms of the agreement, which they did as follows:

BALTIMORE, May 16, 1906.

SEWERAGE COMMISSION OF BALTIMORE.

Gentlemen:—

In the matter of the purchase of property for you we hereby agree to negotiate the purchase on a basis of commission not exceeding one and one-quarter per cent. on the amount of the aggregate purchases. From our previous experience we do not anticipate the commission will amount to the above.

Very truly yours,

WILLIAM MARTIEN & COMPANY."

"The foregoing terms are accepted by the commission.

May 17th, 1906.

PETER LEARY, JR., Chairman."

That after plaintiffs signed this contract, Mr. Hendrick then showed them a small sketch of the property desired by the Commission, which they said contained about one square mile; that they did not know who owned the property, but the Mayor said that "Mr. Willis was a property owner in that section;" that these gentlemen then turned the plaintiffs over to Mr. Hendrick, to whom plaintiffs were to make their reports as they progressed in the work. That the next day General Leary told them that the Commission had accepted the contract formally, and had noted the acceptance on the contract, and the plaintiffs then asked him to give them a copy of the contract, which he did. That after the contract was executed, plaintiffs, in order to find out who the owners of the land were, had to go to Back River and take a launch, and run down the river, and inquire of the man in charge of the launch as they went along the names of the land owners on either side of the river. The man showed them the lines of the Willis property, and gave them information about other properties, including the property of Mr. Jacob Nor-

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ris; that they stopped, on their return up the river, at the Norris property, and called on Mr. Norris and questioned him about the sale of the property. That they made daily reports to the Commission of their progress; that they were instructed not to call on Mr. Willis until Mr. Hendrick said so, but to gather information regarding property values, and when plaintiffs felt prepared to see him to report to Mr. Hendrick, and this they did on the 21st of May, and Mr. Hendrick told them then to call on Mr. Willis. That plaintiffs went to see Mr. Willis the next day and told him that they had come to see him in regard to his property; that Mr. Willis said his property was not for sale; that plaintiffs told him that they were not willing to accept that as his answer, that they were there to negotiate for his property, and desired to deal with him for it; that he insisted that he did not want to sell it, and they told him he might have to sell it, and that then Mr. Willis said, "well, now if you represent anyone having the power of eminent domain, such as a railroad company, and can make me sell the property, I am not as foolish as that and I will talk to you about my property;" that plaintiffs told him that their client had "the right of eminent domain," and that he said then he would talk to them, and told them that his property contained about six hundred acres, he did not know the correct area; that he estimated that he had about 5000 feet on Back River, and about 1000 feet on Eastern Avenue, and about 500 acres of inland property; that he estimated his front on the river to be worth about \$1.00 a foot, and his front on Eastern Avenue at \$2.00 a foot, and the 500 acres at \$200.00 an acre, and said that he would take \$250,000.00 for the property. That plaintiff asked him if he could get a plat of his property for them, so that they "could get down to correct dealing with him on his property," as it was not satisfactory to deal on roughly estimated acreage or frontage, and he said Bouldin had made surveys at different times of portions of the property, and that he would see him. That plaintiffs made a written report of this interview with Mr. Willis to the Commission on the 22nd of May; that

on the 24th of May they went to see Mr. Willis again to see if he had gotten a plat of the property, and he said that Bouldin was to proceed at once to prepare a plat of his property, and that as soon as he got hold of it he would let them have it; that they then talked to him about the value of property in that section, quoting sales at different places, and told him he should name a different price for his property, but he still insisted that it was worth \$250,000.00, "and that was his price for it." That plaintiffs reported to the Commission that same day, and they told them to continue negotiations with him. That on the 25th of May they reported to the Commission the result of negotiations on the other properties involved, and were then told by General Leary that they thought they could assist the plaintiffs in their negotiations with Mr. Willis, and that they thought it was desirable for them to "see him, and show their hand, and explain the purpose for which the property was wanted; that the fact they would see him would not interfere with us, but would aid us; that this was a large city improvement and Mr. Willis was a prominent city official, closely affiliated with the administration and the fact of their seeing him they thought would tend to aid in the purchase of the property;" that he requested plaintiffs to see Mr. Willis and arrange for him to meet the Commission at the City Solicitor's office the next afternoon; that the plaintiffs called on Mr. Willis and told him that their principals desired to see him in regard to the property, and to meet him at the City Solicitor's office Saturday afternoon. That they did meet, and that after the meeting plaintiffs were informed by the Commission that the statement Mr. Willis made to them was identically the same he had made to the plaintiffs, and that they did not see how it was possible for them ever to reach an understanding with Mr. Willis in regard to the property. That afterwards plaintiffs saw Mr. Willis again, and told him that they would like very much to reach an understanding with him in regard to his property, "and desired to negotiate further;" that they asked him to give them another price, and he refused to do it, say-

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ing "you are seeking to buy, I am not seeking to sell, it is your place to make an offer," that plaintiffs reported to the Commission on the 15th of June, and tried to get from them authority to make Mr. Willis an offer, but they thought it was entirely useless as their ideas and Mr. Willis' were so far apart that they didn't see how it was possible to reach an understanding with him. That this was the end of plaintiffs' negotiations with Mr. Willis.

Mr. Willis, who was called as a witness by plaintiffs, states that the plaintiffs came to see him several times at his office and once at the property; that they asked him how much land he had and he told them about 500 acres, and that if they represented somebody who had the right to take the property he would take \$250,000.00 for it; that when he met the members of the Sewerage Commission at the City Solicitor's office, at the time mentioned by James C. Martien, he told those gentlemen the same thing he had told the plaintiffs. That the matter was not taken up again for sometime afterwards, and until he learned that they were about to proceed with condemnation proceedings in Baltimore County; that he was told by people in Baltimore County that they had been employed to go ahead, and that he then addressed a letter to General Leary, having first seen Mr. Hendrick, "and told him that I realized that the City had a right to take it; that it was by the grace of the State I owned it, and by its grace it could be taken away from me, and that the only thing we could dispute about would be the price. I did not dispute the right of the City to take it. The only thing about which we could honestly differ in connection with it would be the price. I proposed to settle it by a gentlemen's agreement rather than to trust to the condemnation juries of Baltimore County. He seemed to think well of that, but said he would have to submit it to his Commission, which was done. The Commission approved of it, and an agreement was prepared to submit it to arbitration, the agreement was signed, the arbitrators were appointed, the Commission met and decided the case. I remember General Leary saying he wanted the

paper drawn so there could be no delays in the matter, and wanted it final. If they had said ten dollars to me, I would have been bound to have taken it. I did not get as much as I thought I ought to have gotten, and do not think so now; but I am man enough to live up to a gentlemen's agreement when I make one."

It further appears from the evidence produced by plaintiffs that the agreement to submit to arbitration was executed on the 7th of February, 1907, and that the price fixed for the Willis property by the arbitration was \$200,000.00. The only evidence offered by the defendant was the deed for the property from Mr. Willis to the City.

By the terms of the written contract entered into by the plaintiffs, and the Sewerage Commission in behalf of the City, the plaintiffs undertook to negotiate the purchase by the City of the property desired for the use of the Commission, for which services they were to receive not more than one and one-quarter per cent. of the aggregate amount of the purchases. In other words, the plaintiffs were employed as real estate brokers by the Commission, representing the City, to negotiate the purchase of the property needed by the Commission, and were to receive as compensation for such services not more than one and one-quarter per cent. of the entire amount of the purchases so made. Now in order to recover under this contract, which is clear and definite, it was necessary for the plaintiffs to show that the City, *through their efforts and negotiations*, in pursuance of the terms of the contract, had become the purchasers of certain property for the use of the Commission. The evidence in the case, which we have set out at length, and all of which was produced by the plaintiffs, shows conclusively that all negotiations and dealings between the plaintiffs and Mr. Willis ceased before the 15th of June, 1906, and that the efforts of the plaintiffs to negotiate the purchase of his property by the City had utterly failed; that both the plaintiffs and the Sewerage Commission had abandoned all efforts to secure and all hope of ever reaching an agreement with Mr. Willis in regard to the purchase

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of the property, and that it was not until a long time thereafter, and until after Mr. Willis had heard that condemnation proceedings were about to be instituted for the purpose of condemning his property, that he went to the Commission himself, and offered to submit the matter to arbitration rather than undergo a condemnation proceeding. Under such circumstances, the acquisition of the property by the City, whether it be regarded as a purchase within the meaning of the terms of the contract or not, was not in any sense the result of the negotiations of the plaintiffs. The right of the plaintiffs to compensation was dependent upon the result of their negotiations. If they failed, and by reason thereof the City was required to resort to other means of acquiring the property, upon what possible grounds can the plaintiffs expect to recover? They did not render the service, viz, "negotiate the purchase," for which the City agreed to compensate them. Their effort to do so may be commendable, but their failure defeats their right to recover.

In the early case of *Keener v. Harrod*, 2 Md. 70, the Court said: "We understand the rule to be this, that the mere fact of the agent having introduced the purchaser to the seller, or disclosed names by which they came together to treat, will not entitle him to compensation," unless it appears that such introduction or disclosure was the foundation on which the negotiation was begun and conducted, and the sale made.

And in the very recent case of *Walker v. Baldwin and Frick*, 106 Md. 634, this Court said: "All the cases agree that the disclosure of the purchaser's name and the putting of him in communication with the defendant by the plaintiff, must not only be the foundation upon which the negotiations were *begun*, but upon which it was *conducted* and the sale *ultimately made*. * * * The broker must be shown to be the *procuring cause* of the sale. The intervention of the plaintiff in beginning the negotiations, and their subsequent culmination in a sale will not suffice unless *those negotiations* were the ultimate cause of the sale." In other words, to entitle a broker to recover commissions for the sale or purchase of

property, he must not only show his efforts or negotiations to accomplish the sale or purchase, but he must show that the sale or purchase was *accomplished as the result* of such efforts or negotiations. As the plaintiffs in this case failed to show that the property was acquired by the City as a result of their efforts and negotiations, there was no error in the instruction of the Court to the effect that under the pleadings and evidence the plaintiffs were not entitled to recover commissions on the amount paid for the Willis lot. Many other cases in this State might be cited, including the case of *Blake v. Stump*, 73 Md. 160, referred to by counsel for appellant, in support of the rule we have stated, but they are all so entirely in accord with the early case of *Keener v. Harrod*, *supra*, and the late case of *Walker v. Baldwin*, *supra*, from which we have quoted, that we deem it unnecessary to make further reference to authorities. Nor is it necessary to discuss the cases referred to by the appellant, further than to say that we do not understand them as opposing the view we have expressed. There is no doubt as to the meaning of the term "negotiate," in the contract in this case. If we accept the definition in *Palmer v. Ferry*, 72 Mass. 420, cited by appellant, viz, that "To negotiate means to conclude by bargain, treaty or agreement," and apply it to the contract in this case, the plaintiffs contracted "to conclude by bargain, treaty or agreement" the purchase of the property, and it is their *failure to do so* in this case that defeats their right to recover.

The evidence objected to and excluded by the Court in the first exception, was evidence to show the negotiations of the plaintiffs in regard to property *other* than that purchased by the City. The plaintiffs in their declaration claim commissions only on the property purchased, and do not make claim to any other commissions, therefore this evidence was not admissible under the pleadings, to which the Court was bound to look in determining the admissibility of evidence.

Md.]

Syllabus.

Finding no error in the rulings of the Court in the first exception, or in granting defendant's first prayer, it becomes unnecessary to consider the other questions presented by the record, and we must affirm the judgment below.

Judgment affirmed with costs.

GEORGE T. COULSTON ET AL. vs. THE MAYOR AND
CITY COUNCIL OF BALTIMORE.

*Taxation in Annexed Territory of Baltimore City—Turnpike
Road as a Boundary—Paved Streets.*

Under the Act of 1902, Chapter 130, relating to the taxation of landed property situated in the territory annexed to Baltimore City in 1888, the full city rate of taxation cannot be imposed until the land is formed into blocks of ground bounded on all sides by intersecting streets, opened, graded and paved from curb to curb, and until there shall be upon every such block of ground at least six houses. *Held*, that a turnpike road used and graded as a street may be treated as one of the boundaries under said Act.

Held, further, upon the facts of the case, that a certain street was improved by pavement within the meaning of the Act.

Decided January 13th, 1909.

Appeal from the Circuit Court of Baltimore City (GORTER, J.)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON and HENRY, JJ.

S. S. Field (with whom was *Frank Driscoll* on the brief),
for the appellant.

Edgar Allan Poe, City Solicitor, for the appellee.

BURKE, J., delivered the opinion of the Court.

The appellants are the owners of property situated on Pennsylvania Avenue, Baltimore City, and embraced in the territory annexed to the City of Baltimore by the *Act of 1888, Chapter 98*. It was taxed at the full city rate for the year 1907, and the City Collector presented bills to the appellants demanding payment of the taxes, and notified them that unless the bills were paid within thirty days from July 1, 1908, he would take legal proceedings to enforce the collection of the taxes. The appellants, contending that their property under the Act of 1888, Chapter 98, known as the Annexation Act, as amended by the *Act of 1902, Chapter 130*, called the *Foutz Act*, is liable only to the sixty-cent rate for city purposes, filed their bill of complaint in the Circuit Court for Baltimore City for an injunction against the Mayor and City Council and Henry Williams, City Collector, to restrain them from demanding and collecting from the plaintiffs any greater sum for city purposes than the sixty-cent rate. The Court passed an order upon the bill requiring the respondents to show cause why an injunction should not issue as prayed.

The defendants demurred to the bill, but the Court overruled the demurrer. They then answered, and averred that the property of the plaintiffs was liable for the year 1907 to the full city rate of one dollar and ninety-seven and a half cents, and not for the rate of sixty cents as claimed in the bill. A general replication was filed, and testimony was taken in open Court before JUDGE GORTER, who, by consent of the parties, visited the property and inspected the condition of Pennsylvania Avenue at the place in question. On the 10th of August, 1908, he passed a decree dismissing the plaintiffs' bill. The record presents for consideration two questions:

Md.]

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1. Can a turnpike road be treated as an intersecting boundary under the Acts mentioned above?
2. Is the Reisterstown Turnpike Road, one of the boundaries of the block in question, "opened, graded, kerbed, and otherwise improved from kerb to kerb by pavement, macadam, gravel, or other substantial material," as required by the Foutz Act?

The block does not exceed two hundred thousand superficial square feet, and it is admitted that the decree must be affirmed if the turnpike road may be used as one of the boundaries of the block, and if it is improved as required by the Foutz Act. This Court has had occasion frequently and so recently to consider the Acts of Assembly relating to taxation in the annexed territory of Baltimore City that it is unnecessary to discuss them anew in this opinion. We could not state more clearly than we have already done the principles which should guide the City in the imposition of taxes in the annexed district. *Sindall v. The Mayor and City Council*, 93 Md. 526; *Rosenthal v. The Mayor, Etc.*, 102 Md. 298; *Hiss v. The Mayor, Etc.*, 103 Md. 620; *Gail v. The Mayor, Etc.*, 106 Md. 684; *The Mayor, Etc., v. Schafer*, 107 Md. 38.

After much that has been said calculated to create in the public mind a misapprehension of what this Court has so plainly decided, and to create the impression that some injustice has been done the city by these decisions, it was gratifying in this case to hear the learned City Solicitor declare that in no case decided by this Court had the City been denied the taxes to which it was rightly entitled.

The facts of this case are few. The property of the plaintiffs is situated in a block of ground bounded by Pennsylvania Avenue, Lynnbrook Avenue, Woodbrook Avenue, and Fulton Avenue. These avenues, except Pennsylvania Avenue, are public and paved Avenues of the City, and there is no claim made that they are not improved as required by the Foutz Act. The block is improved by more than six dwelling houses, but the exact number and character of the houses in the block

are not shown by the record. The block has the advantage of city lights. Pennsylvania Avenue in front of the plaintiffs' property is owned by the Reisterstown Turnpike Company, and it is contended that this turnpike road cannot be treated under the law as an intersecting boundary because, it is argued, that by the true construction of the acts mentioned none but public streets, avenues, and alleys can be used as intersecting boundaries. In support of that position the appellants rely upon the case of *Valentine v. Hagerstown*, 86 Md. 486. That case was fully considered in *Sindall's Case*, *supra*, in which this Court held that it was not essential to the right of the city to impose the full tax rate that the streets and avenues bounding the block should be *public* as claimed by the appellants in this case. We regard that case as decisive of this question. The reason why the *Valentine Case* cannot control the decision of the question here presented are fully stated by JUDGE MCSHERRY in the *Sindall Case* on pages 530, 532. Although it was expressly decided in that case that private streets might be used as boundaries of the block, the *Act of 1902, Chapter 130*, which was passed shortly after that decision for the purpose of mitigating some of its supposed hardships, contains nothing to show the slightest intention to change the law of that case in the respect indicated. It defined the terms "landed property," and "block of ground;" declared how the streets should be improved; but did not require that they should be *public* as distinguished from private.

2. The only remaining question in the case is this: Is Pennsylvania Avenue, which we have held can be legally treated as one of the boundaries of the block, "opened, graded, kerbed and otherwise improved from kerb to kerb by pavements, macadam, gravel, or other substantial material?" The plaintiffs are claiming the benefit of certain provisions of law under which a partial exemption from taxation is conferred under certain given conditions. To secure this exemption the proof must bring the case fairly within the terms of the Acts by which the exemption is granted. We said in *Sindall's*

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Case, supra, that the provision at the end of *Section 19* of the *Act of 1888, Chapter 98*, "was a restriction on the power of the municipality to levy more than a designated rate of taxes on property annexed to the City limits, until a prescribed condition is complied with. Like every other exemption from taxation it must be strictly construed. The taxing power is never presumed to be surrendered, and, therefore, every assertion that it has been relinquished must, to be efficacious, be distinctly supported by clear and unambiguous legislative enactment. To doubt is to deny an exemption."

Pennsylvania Avenue is opened, graded and kerbed on both sides. It has gutters on both sides properly paved. And there are car tracks in the centre of the avenue and the space between the tracks, and two feet on the outside thereof is paved. The dispute in the case relates to the character of the roadbed between the outside of the gutters and the paving along the car tracks, the width of this space being six or seven feet. Its condition and its construction were largely questions of fact to be decided by the Judge before whom the case was heard. There is a presumption that he decided these questions rightly, and upon the facts appearing in the record we are not prepared to reverse the decision. The only witnesses produced to support the allegations of the bill were Messrs. Coulson, Schneider and Flater, three of the plaintiffs, and the evidence given by them is to the effect that the portion of the roadbed mentioned gets muddy in places after a rain, and in dry weather it gets dusty. They, however, admit that this roadway cannot be called a dirt road, or a country road, and that at times broken stones are deposited in the road for the purpose of filling holes which make their appearance therein from time to time. And there is testimony that at some places there is no stone at all, at least so far as the naked eye can see. Mr. Payne, an employee of the City examined the condition of the road on more than one occasion and testified that Pennsylvania Avenue at the intersection of Fulton Avenue corresponds with the grade of Fulton Avenue as repaved; that the grade is a nice grade up to

the crown of the hill, which is close to Lynnbrook Avenue; that he found the street kerbed both on the north and south side; that the gutter is paved and that there is about eighteen inches of cobble between the gutter stone and out from the gutter stone; that between the car tracks it is paved and that there is a space on the sides of the car track of about six or seven feet between the paving extending from the gutter and the paving extending from the car track on both sides of the street. He testified that in 1903 he made a report on that block and reported that, in his judgment, it was a macadam street; that it has the pike macadam condition, and that there is a solid, substantial base, even where the holes were, and when it had been somewhat cut up the south half of the street was in a very good condition, and that he could not see any fault that could be fairly found with it. This Court has never hesitated to restrain the collection of taxes levied upon annexed property in disregard of the provisions of the acts we have referred to; but it has never resorted to a forced and strained construction to accomplish that result. We think the situation and the character of the plaintiff's property, and the surrounding conditions are such as to fairly warrant the imposition of the full City rate. These annex tax cases must of necessity be disposed of upon the facts of each particular case. All this Court can do is to announce, as we have repeatedly done, the rule by which the Appeal Tax Court should be governed. The decision of each particular case coming here must depend upon our determination as to whether there has been a fair and just application of that rule to the facts of the particular case as they are shown by the record.

Decree affirmed with costs.

Md.]

Syllabus.

RICHARD H. PLEASANTS vs. WILLIAM O.
McKENNEY ET AL.

Wills—Caveat—When Executor Not Necessary Party to Proceeding—Petition Alleging Verdict of Jury Under Caveat to Be Result of Collusion.

The executor named in a will is not a necessary party in his individual capacity to the trial of issues under a caveat filed to the will before the probate thereof, but he is a proper party, and has the right to be made a party to the proceedings if he desires to defend the will.

An administrator *pendente lite*, appointed after the filing of a caveat to a will, is not a necessary party to the trial of the issues under the caveat.

Under a caveat filed to a will offered for probate, the executor named therein was made one of the caveatees, and answered the petition for the caveat denying its allegations relating to the *factum* of the will. Subsequently, the caveators filed an order dismissing the caveat as against the executor. Some months afterwards, issues under the caveat were sent to a Court of law for trial, and the verdict of the jury was that the will had been revoked after its execution. The executor then filed a petition alleging that the trial of the issues had been had without any notice to him; that he was a necessary party; that there had been no real contest, but the proceedings were the result of collusion, and he prayed that the verdict be not acted upon. These allegations were denied by the respondents, but no testimony was taken to support either the petition or the answer. From an order of the Orphans' Court dismissing this petition and refusing probate of the will in accordance with the verdict of the jury, this appeal was taken. *Held*, that since the petition does not allege that the verdict was obtained by fraud, and does not set forth the particulars of the collusion alleged, and since the executor made no effort to be reinstated as a party to the proceedings

under the caveat after his dismissal therefrom, he is not now entitled to impeach the finding the jury.

Decided January 13th, 1909.

Appeal from the Orphans' Court of Baltimore City.

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON and HENRY, JJ.

John E. Semmes and Richard H. Pleasants (with whom were *Jesse N. Bowen and John E. Semmes, Jr.*, on the brief), for the appellant.

The whole proceeding was without any notice whatsoever to the appellant, and therefore the proceedings of the Orphans' Court on issues sent to the Court of law were a nullity, because as is disclosed by the record, they were had after the appellant had appeared and become a party to the proceedings in the Orphans' Court, that then his name was stricken out as a party to the said proceedings improperly and improvidently. Thereafter the issues were framed entirely without notice to him, he had no opportunity to object to the transmission thereof, or to have counsel present at the trial; that the first notice brought to him of a continuance of the proceedings in this case was the rendition of the judgment in the Court of law. He then pursued the only method left open to him, namely, to petition the Orphans' Court not to act upon the findings of the law Court.

The above action on the part of the parties to the caveat we contend was the result of collusion and fraud, and the appellant was subject to a complete surprise in the premises, being entirely without notice of the proceedings. This allegation is set forth under the fifth clause of appellant's petition, which states:

"That after said refusal (referring to the refusal of the appellant to become a party to the agreement to set aside the will), your petitioner was eliminated by the method shown

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by the record, namely, the caveat was dismissed as to himself, and all the proceedings, thereafter, were had without notice to him and without notice to the only one who was proper to contest or resist the agreement to do away with the will, and your petitioner charges, therefore, that the entire proceedings were the result of collusion."

We therefore contend that the Orphans' Court erred in acting against the protest of the appellant upon the certification of the findings of the jury upon the issues submitted upon their order, passed on the 15th day of October, 1907—

(1) Because the parties who are required by law to be the parties plaintiff and defendant were not made parties plaintiff and defendant.

(a) The appellant, Richard H. Pleasants, who is named as executor in the will of June 25, 1897, was properly named as caveatee.

It is a well settled principle of law that an executor derives all his interest from the will, and the probate is only the legitimate evidence of this interest (*Decker v. Fahrenholtz*, 107 Md. 515; 23 *American and English Encyclopaedia of Law*, 2nd Edition, 136; 2 *Gill & Johnson*, 80). He is the person named in the will to carry out the wishes of the testatrix, the person in whom she reposed the greatest confidence. Furthermore, it is his duty to see that the will is filed for probate. *Briggs v. Dillard*, 104 Md. 411.

In *Schull v. Murray*, 32 Md. 9, the Court says: "The will has not been admitted for probate, no letters have been granted to him, and the very question at issue was, whether he would be the executor or not, he was named executor in the paper whose existence and validity as the will was the subject of dispute, and merely stood in the proceedings as a party caveatee, whose interest and perhaps whose duty it was to sustain the instrument. He occupied no different relation to the proceedings than if he had been named as devisee or legatee in the will, and for that reason had been made a party caveatee."

The Court above stated that the executor is in no different

position than a legatee, and he is, therefore, a necessary party defendant to the caveat. For it was held in *Little Sisters of the Poor v. Cushing*, 62 Md. 416, that although the legatee is not the proper party *after* probate, for the executor in such a case is considered to represent all legatees; still the situation is entirely different *before* probate, that is, all legatees are necessary parties. The Court says: "He (the executor) is the proper representative of the legatees in all legal controversies. *Before* the probate of the will the position of legatees is essentially different."

It is true that the very existence of his executorship depends upon the validity of the will which is being contested, but should this will be held to be *valid*, the time of his executorship relates back to the date of the death of testator, and any expense incurred by him in counsel fees, etc., in defending this will, will be allowed to him by the Court. *Ex parte Young*, 8 Gill, 285; *Tilghman v. France*, 99 Md. 611.

If, however, the caveat is sustained, no such fees could be recovered. Not only do we respectfully submit he was the executor named in the will, and as such, therefore, a necessary party defendant; but unless he can be considered to have represented the interests of certain residuary legatees, namely, the children of George G. McKenney, they were entirely without representation in Court.

By the fifth clause of the will of the testatrix, a life interest was given to George G. McKenney, one of the caveatees, with the remainder over to his child or children, if any should survive him. Here, therefore, we have a case whereby estates in remainder to born or unborn children are given, and where there is an attempt to extend a life interest to an absolute interest and cut out these born or unborn children.

No Court would countenance such a proceeding, unless the unborn children are properly represented (*Munnickhuysen v. Magraw*, 57 Md. 187; *Emmert v. Stouffer*, 64 Md. 557; *McArthur v. Scott*, 113 U. S. 387). We contend that they had no representation in the case, except on the theory that where the appellant was named as caveatee, and he came in

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by answer under oath defending the validity of the will, denying the allegations of the caveat, then might these unborn children be said to have had a certain representation in the case, although the proper procedure would have been to have some one named by the Court to represent them.

(b) The method of dismissal of the appellant as caveatee was irregular and contrary to law. Granting purely for the sake of argument that it had been possible for the case to have proceeded in the lower Court without the continuance of the appellant as caveatee, which we deny, the method pursued by the attorneys for the caveators in their attempt to dismiss the caveat as to the appellant was void.

The principle of law is well recognized that a plaintiff is not entitled without previous permission of the Court to dismiss his bill as against certain defendants. In the case at hand, after the appellant had gone in under oath and filed his answer to the petition of the caveators denying the various allegations of the said petition, thereby raising the issues of the case, and the only issues therein, for it is well settled law that being a plenary proceeding, founded on petition and answer, the presence of an answer to the proceedings, denying the allegations is *essential* to the framing of issues. After, therefore, the appellant had filed such answer, the caveators by the above form of notice, attempted to dismiss the petition and caveat as to the appellant without notice to the said appellant. *Miller on Equity*, par. 102, page 133; *Riley v. First Nat. Bank*, 81 Md. 27.

It has also been repeatedly decided in this State where a petition for a caveat to a will has been answered and issues *have been sent* to a Court of Law for trial, the caveator has no right to dismiss the proceedings without the consent of the Court; that the right of the plaintiff to discontinue the case after it has been instituted is not absolute. *Price v. Taylor*, 21 Md. 356; *Berry Will Case*, 93 Md. 560; *Bennett v. Bennett*, 106 Md. 122.

In the case at bar, although the caveators have not attempted to dismiss the proceedings entirely, but only as to the appel-

lant, yet, it is contended that inasmuch as the only answer in the case which denied the allegations of the petition was filed by the appellant, that a dismissal as to the appellant virtually amounted to a dismissal of the entire proceedings. This dismissal was, it is true, prior to the sending of the issue to the law Court, but after the appellant had answered fully, accompanied by affidavit, the petition filed against him, the case can be considered to fall under the principle of law above stated.

(2) Because the issues submitted for the findings of the jury were not the issues raised by the pleadings in the case.

(a) The only issues raised by the pleadings in the case were those raised by the answer of the appellant to the petition of the caveators. As has been set forth in the statement of facts, the only answer controverting the allegations made in the caveat was that filed by the appellant. The other caveatees, all heirs at law of the testatrix, can in no way be considered to have denied the allegations of the caveat, for they expressly stated in their answer under oath that they "neither admit nor deny these allegations," but consent to the passage of a proper order therein.

It seems hardly necessary to cite authorities to the effect that only in cases of *real* contest, in which there is an allegation on one side and a denial on the other, can the Orphans' Court frame issues. In the language of the Code, it is expressly stated that "The Orphans' Court may, in all cases of *controversy* therein, upon application of either party, direct plenary proceedings by bill or petition, etc., etc." *Public General Laws*, Code 1904, art. 93, sec. 253. See *Little Sisters of the Poor v. Cushing*, 62 Md. 416.

An issue is therefore formed by affirming a matter on one side, and *denying* it on the other. *Ward v. Poor*, 94 Md. 133; *Sumwalt v. Sumwalt*, 52 Md. 339; *Taylor v. Nuttle*, 62 Md. 143; *Emmert v. Stouffer*, 64 Md. 543; *Gross v. Busick*, 91 Md. 389.

From this array of authorities it is submitted that it cannot be questioned that the Orphans' Court has absolutely no

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power to send issues to the law Court which are not the result of a *bona fide* dispute and controversy with regard to the matters brought out in the caveat. In other words, that the very object of allowing the Orphans' Court to advertise itself as to certain issues brought forward by the pleadings, is to do away with the possibility of raising such issues by the consent and collusion of the parties to the proceedings. In *Cain v. Warford*, 3 Md. 462, it is said: "It is not competent and proper to frame issues in a case where there is an entire agreement between the parties before the Court as to the facts alleged." See the *Magraw Case*, 57 Md. 190, which raises points almost identical with the case at bar.

The record in this case unmistakably shows that the finding of the jury in the law Court and the order of the Orphans' Court passed thereon were both entered entirely without the existence of any real contest, but that in reality the heirs at law, who were desirous of having the will set aside, controlled absolutely both sides of the controversy. This is evidenced by (1) the dismissal of the executor as a party; (2) the failure to make the children of George G. McKenney parties; (3) the failure of the remaining caveatees to deny the allegations of the caveat; (4) the waiver of appeal by the defendants in the law Court (the remaining caveatees); and (5) the agreement of both plaintiffs and defendants in the law Court to forthwith transmit the record to the Orphans' Court.

(b) Only the issues raised by the allegations in the original caveat could have properly been sent to the law Court.

The sixth issue submitted to the jury in the law Court, namely, as to revocation *vel non* of the will of the testatrix was not raised at all in the petition and answer, but was an extra or additional issue added by the caveators subsequent to the answer filed by the appellant. The only issues properly raised are those which are the result of the caveat and the answer or answers thereto. *Taylor v. Nuttle*, 62 Md. 342.

It is obvious from this that unless it was shown by the caveat and answer that there was an allegation on one side as to the revocation *vel non* of the will of the testatrix, and a

denial on the other, this question could not be submitted to the law Court for trial. In *Richardson v. Smith*, 80 Md. 89, it is said: "The issues should be framed concerning the parties named and the matters set forth in the petition and answer." This case also reiterated the well-known principle of law that an issue is formed by affirming the matter on one side and denying it on the other; that this collision of statements is its very substance and essence.

3. Because the paper writing denounced by said verdict refers to the paper writing of June 5th, 1897, and not the will filed for probate by your petitioners, dated June 25th, 1897.

J. Cookman Boyd (with whom were *Burdette B. Webster* and *Peter J. Campbell* on the brief), for the appellees.

Ellen McKenney, an aged lady, departed this life March 15, 1907, leaving an estate valued at about \$8,000. On June 25, 1897, she executed the paper writing involved in this controversy. This paper was drawn by a comparative stranger to Mrs. McKenney. September 11, 1903, the lady through her regular counsel executed another will in which the former will was expressly revoked. Subsequently Mrs. McKenney destroyed the will last executed, and at the time indicated that she was under the impression that the will of 1897 had been destroyed in the great fire of 1904. There was some dispute as to facts, and there never was an agreement of parties thereto. But the legatees and next of kin were at first divided as to the effect of the destruction of the last paper which expressly revoked the former; and in this division of opinion the counsel for the respective parties conscientiously shared. Investigation showed at least some excuse for this disparity of views, as the decisions of the courts of this country are in direct conflict, some following the ecclesiastical, others the common law, rule. 30 *A. & E. Ency. of Law*, 658.

However, research revealed the fact that *Massachusetts* (134 Mass. 256) and *Maryland* (20 Md. 357) have unalter-

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ably declared in favor of the ecclesiastical rule. In the carefully considered case of *Colvin v. Warford*, 20 Md. 391, our Court of Appeals said: "But a clause in the subsequent will, which in terms revokes a previous will, is not only an expression of the purpose to revoke the previous will, but an actual consummation of it, and the revocation is complete and conclusive, without regard to the testamentary provisions of the will containing it."

This seemed to be conclusive of the law of the case, and all parties interested were finally convinced that the facts should be frankly and fairly submitted to a jury under the instructions of a Court learned in the law.

The sixth issue reads as follows: "Was the said paper writing, dated the 5th day of June, 1897, and purporting to be the last will and testament of Ellen McKenney revoked by her subsequent to the execution thereof?"

This issue was framed concerning the matters set forth in caveator's petition and the answers thereto.

But what has the appellant to do with this question? It can only be raised at the time of framing the issues in the Orphans' Court. He filed an answer. Why did he not look after the issues and object. The Orphans' Court controls the issues, and they can not be collaterally assailed. Besides, the Court by its order makes the parties to the issues. *Pegg v. Warford*, 4 Md. 485.

A party can take an appeal from the order framing them, if he does not like them. *Little Sisters v. Cushing*, 62 Md. 421; *Richardson v. Smith*, 80 Md. 89; *Gross v. Burneston*, 91 Md. 389. In the absence of fraud, he has no other remedy; and no fraud is proven in this case.

The appellant knew of the proceedings; he filed an answer on April 10, 1907. He had his opportunity to appeal from the order of October 15, 1907; and for the first time he makes the objection on April 4, 1908, in this petition. Is this the kind of diligence required of a party? The law will not permit a man to sleep upon his rights if he has any; nor does it impose upon the Court or adverse counsel the duty of taking

care of his case. He himself must be diligent. *Johnson v. Standard Mining Co.*, 148 U. S. 370; *Hadaway v. Hynson*, 89 Md. 313.

We submit that Mr. Pleasants is not a necessary party to these proceedings and has no interest in the case. The alleged will was never proven; Mr. Pleasants never secured letters testamentary thereon. Much was said at the hearing about the rights of unborn infants; but the appellant did not take testimony as to any wrongs inflicted upon anyone; and he must stand absolutely upon the pleadings without proof as to any facts—and he could prove no infraction of any right. He cited the *Magraw Cases*, 57 Md. 172 and 58 Md. 557. The trustee had *resigned*, and there was no one to represent the unborn children. In our case, Edwin A. Hedian is the trustee under the will and as such a legatee; he did not resign; and the Court of Appeals has said most clearly that the trustee is the only proper and necessary party in such cases. *McDevitt v. Bryant*, 104 Md. 187.

Schull v. Murray, 32 Md. 9, was cited below in support of the contention that the executor is a necessary party, even when the will is assailed before probate; but that case merely decided that when such a person is not a party to a proceeding in the capacity of executor, he is competent to testify. The question is not who *may* be a party when no objection is made, but whether Mr. Pleasants is a necessary party.

It is unnecessary to look to inference and analogy; our Court of Appeals has repeatedly held that when the caveat is filed before probate of the alleged will, the executor named therein is not a necessary party. *Decker Case*, 107 Md. 515; *Tilghman v. France*, 99 Md. 614, 616; *Harrison v. Clark*, 95 Md. 313; *Magraw Case*, 58 Md. 561; *Winchester v. Bank*, 2 G. & J. 80; *Ratrie v. Wheeler*, 6 H. & J. 94. See also—18 *Cyc.*, 213.

A party named in a will as executor cannot sue or be sued either at law or in equity until he has duly qualified. *Ratrie v. Wheeler*, 6 H. & J. 94. "He cannot assert his right in

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Court, as an executor, without producing his letters testamentary." *Winchester v. Union Bank*, 2 G. & J. 80.

A judgment has been rendered in this matter by a Court of competent jurisdiction, and that judgment is conclusive on the whole world and can be impeached only for fraud. *Worthington v. Worthington*, 56 Md. 550; *Worthington v. Worthington*, 58 Md. 548; *Munnikhuysen v. Magraw*, 57 Md. 172; *Tabler Case*, 62 Md. 602; *McCambridge v. Walraven*, 88 Md. 378; *Tilghman v. France*, 99 Md. 611; *Cushing Case*, 62 Md. 419.

The judgment of a Court of law may be set aside for collusion by the Orphans' Court. *Munnikhuysen v. Magraw*, 57 Md. 172; *Munnikhuysen v. Magraw*, 58 Md. 557; *McCambridge v. Walraven*, 88 Md. 381; *Meyer v. Henderson*, 88 Md. 590; *Shultz v. Houck*, 29 Md. 24.

The appellant had ample opportunity to adduce testimony as to fraud or collusion, and declined to do so. There is no evidence of fraud in the case. What is there for the Court to consider?

WORTHINGTON, J., delivered the opinion of the Court.

Mrs. Ellen McKenney of Baltimore City died on March 9, 1907, leaving a paper writing, dated June 25, 1897, purporting to be her last will and testament, in which paper writing Richard H. Pleasants, the appellee, was named as executor.

On March 15, 1907, Mr. Pleasants exhibited and filed this alleged will in the Orphans' Court of Baltimore City for the purpose of probate.

Three days later, that is on March 18, 1907, before the alleged will had been admitted to probate, a formal caveat was entered thereto by Mrs. McKenney's two sons, William O. McKenney and George J. McKenney.

The caveat alleged among other things that the paper writing dated June 5, 1897, purporting to be the last will and testament of Ellen McKenney, was not the last will and testament of Ellen McKenney, but that said Ellen McKenney

died intestate. There were also allegations of fraud, undue influence, want of mental capacity and want of proper execution of the alleged will. The appellant and Mrs. Emma Hedian, the only surviving daughter of Mrs. Ellen McKenney, were made caveatees and by citation from the Court, required to answer the premises.

It may be well here to state that by the provisions of the alleged will, a share of Mrs. McKenney's property was given to her only daughter, Mrs. Emma Hedian; a legacy of \$100 to a Mrs. Mary S. Foley, and of the residue, one-half was given to her son William O. McKenney, above named, absolutely, and the other half to Edwin I. Hedian, in trust for the benefit of her other son, George J. McKenney, for life, and after his death to be divided amongst his children.

On April 10, 1907, the appellant, Richard H. Pleasants, as attorney for the executor, filed his answer to the caveat denying that Ellen McKenney died intestate, but averring that she duly and properly executed the paper writing purporting to be her will, dated June 25, 1897, when of sound and vigorous mind and body and fully capable of executing a valid deed or contract.

On May 18, 1907, the attorneys for the caveators filed the following order: "Mr. Register—Enter the petition and caveat of William O. McKenney, and George J. McKenney, as against Richard H. Pleasants, dismissed."

On May 27, 1907, the joint and several answer of Emma Hedian, Mary L. Foley and Edward I. Hedian, trustee, was filed, neither admitting nor denying the allegations of the caveat, but submitting their rights to the protection of the Court, and consenting to the passage of such order in the premises as should be proper.

On October 15, 1907, issues were framed in the Orphans' Court of Baltimore City, and sent to the Superior Court of that City for trial before a jury. By order of the Orphans' Court, William O. McKenney and George J. McKenney were made plaintiffs at the trial of the issues, and Emma Hedian, Mary S. Foley, and Edwin I. Hedian, trustee, de-

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endants at such trial. The issues were six in number and of the following purport:

1. Was the paper writing dated the 5th day of June, 1897, purporting to be the last will and testament of Ellen McKenney, signed by her, or some other person in her presence, and by her express direction and attested and subscribed in the presence of two or more credible witnesses?

2. Was the same read to her or by her, or known to her at or before the time of the alleged execution thereof?

3. Was the execution thereof procured by fraud?

4. Was the execution thereof procured by undue influence?

5. Was she then of sound and disposing mind?

6. Was said paper writing, dated June 5th, 1897, and purporting to be the last will and testament of Ellen McKenney revoked by her subsequent to the execution thereof?

The issues were submitted to the jury in the Superior Court on March 20, 1908, and a verdict rendered in favor of the mental capacity of Mrs. McKenney, and of the due execution of the paper writing of June 5, 1897, also finding no fraud, or undue influence or want of mental capacity, but that said paper writing purporting to be the last will and testament of Ellen McKenney, had been *revoked* by her, subsequent to the execution thereof.

The appellant, as will be seen, was not a party to these proceedings, but on March 23, 1908, three days after the rendition of the verdict, he filed a motion in the Superior Court requesting it "not to certify the findings of the jury to the Orphans' Court." Notwithstanding these objections the findings of the jury were finally transmitted to the Orphans' Court on April 4, 1908.

On the same day, that is on April 4, 1908, the appellant filed a petition in the Orphans' Court praying that Court "not to receive or act upon the findings of the jury," for the following reasons, in brief:

1. Because the findings were had in reference to a paper writing dated June 5, 1897, while the paper filed purporting

to be the last will and testament of Ellen McKenney was dated June 25, 1897.

2. Because the issues sent to the Superior Court were not raised by the pleadings.

3. Because the omission of the name of Richard H. Pleasants, executor, as a party to the proceedings, at the trial of the issues in the Superior Court, was a fatal omission.

4. Because there was no real contest in the Superior Court as the answer of the defendants as caveatees, neither admitting nor denying the allegations of the caveat raised no issues whatever.

5. Because the appellant had been eliminated by a dismissal of the caveat as to himself, and all the proceedings thereafter were had without notice to him, and that the entire proceedings were the result of collusion.

On April 20, 1908, the caveators filed their answer denying the right of the appellant to be considered a party in the cause, or as being entitled to object to any proceedings had or to be had therein, alleging that the error in the date of the paper passed upon by the jury was merely a clerical error and as the paper of date June 25th, was offered in evidence, the findings of the jury were upon that paper; that the issues were properly framed upon the pleadings in the Orphans' Court; and that the parties to the caveat were the proper parties; and denying that there was no real contest.

On April 23, 1908, Emma Hedian, Mary L. Foley, and Edwin Hedian, trustee, filed their answer to the petition of the appellant, denying that he had any standing whatever to be heard in the Orphans' Court in the premises; averring that all the necessary and proper parties were parties to the proceedings in the Superior Court; admitting that they had been advised that upon the indisputable facts of the case the paper writing of date June 25, 1897, had been revoked, and denying all and singular the other allegations of the appellant's petition.

The petition and answers were all sworn to, but, so far as the record discloses, no testimony in support of the allega-

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tions of either the petition or of the answers thereto was adduced.

Subsequently on June 29, 1908, all the parties to the caveat proceedings, to wit: Emma Hedian, Mary L. Foley, Edwin I. Hedian, Trustee, George J. McKenney and William McKenney, moved to dismiss the appellant's petition—

1. Because the petitioner had no interest in the controversy.

2. Because no letters testamentary had been granted to the said Richard H. Pleasants.

On the 31st day of July, 1908, the Orphans' Court passed an order dismissing the appellant's petition and, acting on the findings of the jury to the effect that the paper writing propounded as and for the last will and testament of Ellen McKenney, had been revoked by her subsequently to its date, refused probate thereof.

From this action of the Orphans' Court, the petitioner, Richard H. Pleasants, brings this appeal.

It should be here stated that pending the caveat proceedings, the appellant was appointed administrator *pendente lite* of the estate of Ellen McKenney, deceased, though no claim of right to participate in the caveat proceedings seems to have been made on that ground.

While the briefs of the counsel for the respective parties present several questions for our consideration, which were elaborately discussed at bar, we think we need only consider one of these questions, and that is whether or not the appellant, either in his individual capacity or as administrator *pendente lite*, was a necessary party to the proceedings connected with the caveat of the alleged will?

In this connection it should be remembered that a contest in the Orphans' Court, involving the validity of a paper writing purporting to be a will, is a proceeding *in rem* in which all persons interested may appear and be heard upon the question, and that the order of the Orphans' Court is the judgment of a Court of competent jurisdiction directly upon

the subject matter in controversy. *Worthington v. Gittings*, 56 Md. 542.

When a decision is made between opposing parties in such a contest it is a judgment *in rem* conclusively establishing either the validity or invalidity of the alleged will. *Emmert v. Stouffer*, 64 Md. 543.

The purpose of sending issues to a Court of Law for trial under Sec. 254 of Art. 93, is to enable the Orphans' Court to advertise itself of the real facts of the case. These when found by the jury are conclusive, and the Orphans' Court has no discretion, but must enter the judgment in conformity with the finding of the jury. *Sumwalt v. Sumwalt*, 52 Md. 338.

The proceedings are, however, all the while within the probate powers of the Orphans' Court. *Warford v. Colvin*, 14 Md. 532.

Though the jury may find affirmatively or negatively on the questions submitted, yet such finding may not determine the validity of the will, for there may be facts outside of the verdict and not inconsistent therewith which will decide the question, but when the jury find a fact which necessarily determines the invalidity of the will, the Orphans' Court are imperatively required to enter up judgment in conformity thereto, and the granting of any other issue would be a wholly useless and nugatory act. *Pegg v. Worford*, 4 Md. 385; *Taylor v. Price*, 21 Md. 356.

When issues are sent by the Orphans' Court to a Court of Law, the province of the latter Court is simply to submit to the jury the determination of the issues without reference to whether they were properly presented by proceedings in the Orphans' Court. *Cooke v. Cooke*, 29 Md. 103.

Whether all persons interested in the will are actual parties or not, the finding of the jury is binding and conclusive upon them as to all questions covered by the issues actually submitted to the jury for its determination. *Worthington v. Gittings*, *supra*.

There is no doubt but that a person named as the executor

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of a paper writing purporting to be a will, has such an interest in the proceedings relating to its probate as entitles him to be made a party to any contest in regard thereto, but where a caveat is filed and the contest takes place before probate, the person named as executor must, if he desires to defend the will, do so at his own cost and expense. *Townsend v. Brooke*, 9 Gill, 90; *Gorton v. Perkins*, 63 Md. 589.

He cannot therefore be regarded as a necessary party to such proceedings in his individual capacity, where the contest takes place before letters testamentary have been granted to him.

As to the necessity of the appellant being made a party to the proceedings as administrator *pendente lite*, this Court in a recent case, in a very satisfactory opinion by SCHMUCKER, J., held that: "It is not the duty in this State of an administrator *pendente lite* to conduct at the expense of the estate a litigation to establish an alleged will of the decedent or to defend caveats to papers purporting to be wills. The contest in such litigation is between the next of kin and the parties claiming under the alleged wills." *Harrison v. Clarke*, 95 Md. 313. So that neither in his own right nor as administrator *pendente lite* was the appellant a necessary party to the litigation concerning the validity of the alleged will.

It is true that in his own right as the person named as executor, he had such an interest in the subject matter of the litigation as entitled him, if he desired to defend the alleged will, to be made a party to the proceedings, but although he filed his answer to the caveat as attorney for the executor and was, therefore, in the case as an attorney as well as in his own right, yet from the date of his dismissal, on May 18, 1907, till October 15, 1907, when the issues were made up and sent to the Superior Court for trial, he made no effort to have himself reinstated as a party to the litigation, although it would seem that by the exercise of ordinary vigilance he would have discovered the fact of his dismissal before the issues were made up. And even after the record was transmitted to the Superior Court, and the trial was proceeded with there, he

seems to have stood by and allowed the case to be conducted to a conclusion, in that Court, and then, after verdict rendered, for the first time, interposed objections to further proceedings in the case. Whilst Courts are ever ready to aid vigilant suitors, they will not encourage laches. These objections being unavailing in that Court, were renewed by his petition filed in the Orphans' Court a few days later, that is, on April 4, 1908. In this petition it is not alleged that he then only recently obtained knowledge of his dismissal as a party defendant but only that after his dismissal the proceedings "were had without notice to him."

Had he promptly upon discovering the fact of his dismissal filed his petition in the Orphans' Court, setting forth that such dismissal had then only recently come to his knowledge, and that the same had been accomplished and suppressed by fraud and collusion, he would, upon proof of these facts, have been entitled to be reinstated as a party defendant and to have participated in all the subsequent litigation respecting the subject matter of the controversy; and notwithstanding the finding of the jury, the Orphans' Court would under such circumstances have been justified in rejecting such finding, and in sending the issues to be retried before a jury with the appellant as a party defendant to the proceedings.

But his petition filed on April 4, 1908, not only does not state when the fact of his dismissal first came to his knowledge, but neither does it allege fraud, and though it contains the statement that "the entire proceedings were the result of collusion," yet it does not set forth with sufficient particularity of what the collusion consisted, nor is there any proof, whatever, to sustain the charge.

Even if the proceedings be irregular in any respect, in the absence of fraud and collusion clearly alleged and proven, the appellant had not after the finding of the jury, and standing in Court to impeach them or call them in question. *McCambridge v. Walraven*, 88 Md. 378; *Worthington v. Gittings*, *supra*.

After carefully examining the record in the case and the

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authorities cited by counsel, we can find no ground for reversing the order of the Orphans' Court, dismissing the appellant's petition, and rendering judgment on the verdict of the jury.

We have not considered the motion to dismiss the appeal, because it does not clearly appear from the affidavits filed, whether the delay in transmitting the record was attributable to the fault of the Register or of the appellant, and we therefore express no opinion in regard to the legal question intended to be raised by such motion.

Order affirmed with costs to the appellees.

L. EDWARD WOLF AND MILTON D. LOWENTHAL
vs. ANNIE SHRIVER.

Master and Servant—When Performance of Master's Duty to Furnish Safe Machinery and Keep It in Repair a Question for the Jury—Repairs Should Be Made by Competent Mechanic—Injury to Operator on Die Press—Sufficiency of Evidence.

It is the duty of an employer to use due care to furnish reasonably safe machinery in the first place, as well as afterwards to keep it in repair.

In an action by an employee to recover damages for an injury alleged to have been caused by a defective machine, prayers are erroneous which instruct the jury to find for the defendant if they believe certain facts therein stated, when such prayers assume that the machine which injured the plaintiff was a reasonably safe one, and do not leave the finding of that fact to the jury.

It is the duty of an employer who has in use machines likely to cause injury to operators, if out of repair, to have them examined and repaired by a competent machinist or mechanic, when informed that they fail to work properly.

Plaintiff informed defendant's foreman that the die press upon which she was working was out of order. The foreman oiled it and told plaintiff that it was all right. Soon afterwards, she was injured by an alleged defect in the machine. This foreman was not a mechanic, nor was he competent to make repairs on machines out of order. Under these circumstances, the plaintiff is not precluded from recovering damages for the injury on the ground of a lack of evidence to show that the foreman was incompetent or that the defendant had failed to exercise due care in his selection.

Plaintiff, a young woman, was put to work on a die press in defendant's factory, which was used to cut out labels. A carriage or platen was raised in a perpendicular frame by a lever on the press, and when held up, the operator withdrew the die and paper and put in a new supply. Plaintiff's evidence was that on the occasion of the injury, although she had shut off the power in the usual way, the platen fell without warning, while she was removing the die, and cut off two of her fingers; that shortly before the accident, she had told the foreman that the machine was out of order, and he had oiled it and told her it was all right; that on another occasion, she had complained of the machine to one of the defendants who had promised to have it fixed; also that the clutch which held up the platen was worn and sometimes allowed it to slip down unexpectedly. *Held*, that this evidence, if believed by a jury, was legally sufficient to entitle the plaintiff to recover.

Held, further, that the evidence of contributory negligence on the part of the plaintiff is not such as to bar her right to recover.

Decided January 12th, 1909.

Appeal from the Court of Common Pleas of Baltimore City (DOBLER, J.), where there was a judgment on verdict for the plaintiff for \$3,250.

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, THOMAS and WORTHINGTON, JJ.

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John E. Semmes and Jesse N. Bowen, for the appellants.

William Colton and Benj. H. McKindless, for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

The appellee, a young lady twenty-two years old, had her hand injured by a die press, at which she was working while in the employ of the appellants. She sued them for damages, resulting from her injury, in the Court of Common Pleas of Baltimore City and recovered the judgment from which the present appeal was taken.

There are five bills of exception in the record of which three relate to rulings on evidence and two to the Court's action on the prayers. At the hearing of the appeal the appellants' solicitor stated to us that he would not insist on his exceptions to evidence and they will therefore receive no further notice from us.

The plaintiff offered but one prayer which is as follows: "The jury are instructed that it is the duty of an employer to exercise due and reasonable care and diligence to provide the employed with reasonably safe and proper machinery and equipment to do and perform the work required of such employed and not to expose such employed to unnecessary and unreasonable risk and danger during such employment. And if the jury find from all the evidence in this case that the defendants employed the plaintiff to work upon a machine or device known as a die press, and that such machine or device was unsafe and unfit to be used by the defendants for the purpose to which it was applied, and that said defendants knew, or by the exercise of ordinary care on their part might have known of such unsafe and unfit condition of said machine or device in the premises, and that the plaintiff did not know and could not have known thereof by the exercise of ordinary care on her part; and that on or about the 30th day of November, 1906, while the plaintiff was operating said machine or device, she was injured, and that such injury to the plaintiff was directly caused by the negligence and want

of care of the defendants in the premises and without negligence or want of care on the part of the plaintiff directly thereunto contributing, then the plaintiff is entitled to recover."

No special exception was filed to this prayer for want of legally sufficient evidence to sustain it, although the absence of such an exception was practically overcome by the defendants' first prayer asking the Court to take the case from the jury. The plaintiff's prayer was properly granted as it states the legal propositions applicable to the case in conformity with the decisions of this Court. *Md. Steel Co. v. Engleman*, 101 Md. 682, 683; *Crawford v. United Rys. Co.* 101 Md. 421; *Am. Tobacco v. Strickling*, 88 Md. 500; *Cumb. & Penna. R. R. v. State use of Moran*, 44 Md. 292-3; *Pikesville, etc., Ry. Co. v. Russell*, 88 Md. 571.

Only four prayers offered by the defendants appear in the record. They are designated as the first, second, fourth and sixth and were all rejected by the Court. The first asks the Court to take the case from the jury for want of legally sufficient evidence to entitle the plaintiff to recover. No reference to the pleadings is made in the prayer. The second prayer asks the Court to instruct the jury that the plaintiff was guilty of negligence which directly contributed to the accident by which she was injured and that therefore their verdict must be for the defendants.

The fourth and sixth prayers were as follows:

4th. "The defendant prays the Court to instruct the jury that if the jury find that just prior to the accident the plaintiff called upon Fountain, the foreman in charge of the machinery of the defendant, claiming that the machine would not work, and that thereupon the foreman oiled the machine and told the plaintiff it was all right, then in that event, even though the accident happened by reason of the machinery being out of order, the plaintiff is not entitled to recover, there being no evidence to show that said Fountain was incompetent, or that the defendant failed to exercise due care in his selection as foreman."

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6th. "The defendant prays the Court to instruct the jury that if they find from the evidence that the plaintiff was operating the die press described in the testimony, and that she had been instructed to throw the lever off when the plate or upper bed reached the top, and that she neglected to do so, and that by reason of said neglect, if the jury so find, the plate or upper bed descended upon her hand, then in that event the plaintiff is not entitled to recover."

We will now dispose of the fourth and sixth prayers and then consider the first and second prayers which raise the vital issues in the case.

The fourth and sixth prayers, each of which concludes with a direction to find a verdict for the defendants if the jury believe the facts therein stated, are both defective in assuming and not requiring the jury to find as a fact that the machine which injured the plaintiff was a reasonably safe one and would if properly handled perform the work for which it was intended. They thus ignore the well settled legal proposition that the employer is bound to exercise due and proper care to originally furnish for the use of his employees reasonably safe and proper machinery and appliances as well as to keep them in the condition in which from the nature of the employment the employee had a right to expect them to be kept. This subject has received such frequent consideration at our hands that it is only necessary here to refer to some of our decisions in reference to it. *Md. Steel Co. v. Engleman*, 101 Md. 682; *South Balto. Car Works v. Schaeffer*, 96 Md. 107; *Nat. Enameling Co. v. Cornell*, 95 Md. 527.

The fourth prayer presents the further defect of charging the jury that there was no evidence to show that Fountain, the foreman, was incompetent or that the defendants failed to exercise due care in his selection as foreman. The evidence shows him to have been an experienced paper cutter with some acquaintance with machinery and an honest and industrious man, but he himself testified that he was no machinist. When he was asked what duties if any he had in reference to that machine he replied: "I had all to do with

the tending to it." He was then asked what do you mean by that? He replied: "In regard to running it, setting it up and putting somebody on it that understood it, or if they did not understand it I instructed them how to use it." He was then asked: "Who had charge of the machine to see that it was kept in proper order?" To which he replied: "I did as far as I was able to do it, I was no machinist, but the running capacity I attended to that." Being asked what he would do if it was out of order he said: "If it was out of order I think I would be very foolish not to report it." He was then asked what would be his duty if the machine was out of order, he replied: "To report it to the firm." With this testimony in the record it would have been improper to charge the jury that there was no evidence that Fountain was incompetent *to repair* the machine when it was out of order. Assuming that the evidence shows him to have been competent to oil the machinery and superintend its operation when in running order it does not follow that he was competent to repair it when out of order. The owner of a factory like that of the defendants may not be under any obligation to keep a skilled machinist constantly in his service, but when he has in use machines liable to endanger the life or limb of the operators, who work at them, if out of repair, it is his duty, when he has been informed that one of such machines fails to do its work, to have it examined and repaired by a machinist or other competent mechanic.

Turning now to the first and second prayers of the defendants, we are of the opinion that they were properly rejected.

There is evidence in the record tending to show the following state of facts. The appellants as co-partners were, at the time of the accident to the appellee, conducting a printing and advertising art novelty business in Baltimore City. In connection with that business they used for the purpose of cutting or stamping out labels a machine commonly called a die press. This machine consisted of an iron structure with a flat top somewhat resembling a table. On top of the table there was a perpendicular frame in which a carriage or platen

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ascended or descended when the power was applied to it. In its descending motion it struck a die that, with the paper out of which the label was to be cut, had been placed by the operator on the top of the table, and forced the die through the paper and in that manner cut out the label. A lead plate was placed on top of the table under the paper and the die to prevent the latter from being injured by the force of the blow delivered by the descending platen.

In using the machine the operator stood in front of it and applied the power by a hand lever, drawing the lever toward her to raise the platen and pushing the lever from her to lower it. When the platen had ascended to a point indicated by a mark on the machine, if the lever were not promptly moved, the platen would not remain up but would fall again upon the die beneath it. While the platen was held up in its frame it was the duty of the operator to withdraw the die and paper from underneath it and replace the die with a fresh supply of paper and then by the appropriate movement of the lever cause the platen to fall again and cut out another label. The weight of the falling platen had a tendency to drive the die into the soft lead plate beneath it and make it more difficult to remove the die.

The appellee, without having had any previous experience with machines, entered the service of the appellants in the latter part of July, 1906, and was engaged in pasting forms for clothing until sometime in October when she was directed to operate the die press at which she was injured. She was put to work at the machine by Mr. Wolf one of the defendants who as she said "showed her how to set the die and put it under the machine and pulled the lever and shut it off," but, according to her account, gave her no further instructions in reference to the machine. On cross-examination she said that Mr. Wolf told her if she needed anything or wanted to know anything or anything was wrong with the machine she should see Mr. Fountain.

On November 30, 1906, when the appellee was operating this machine the platen fell upon her hand, as she was en-

deavoring to remove the die and paper from under it, and cut off two of her fingers and permanently mutilated the hand. According to her account she had shut off the power in the usual way with the platen suspended at the top of the machine, and was endeavoring to remove the die and paper in the usual course of her work when the platen descended without warning upon her hand and injured it. She further testified that a week or so before the accident she noticed something wrong about the machine. On being asked what that something was she replied: "As I had put the die in to get the labels cut I had throwed it off, and the machine descended and I quick done like that (indicating)." Q. Got your fingers out? "Yes, I noticed it was doing like that and I thought to myself it ought not to do that, of course I did not know; I called Mr. Fountain's attention to it, he fixed at it and then he told me he could not do anything with it, to tell Mr. Lowenthal." * * * "I told him (Lowenthal) there was something wrong with the machine and he said 'in what way?' I says 'well when I shut the machine off it descends.' He takes the handle and pulls it and tries to run the machine and he put it back again and he says: 'Well I'll have the machine fixed.' After he fixed it himself he said: 'All right go ahead I will have it fixed.'"

She further testified that on the morning of the day of the accident when she was running the machine she put in the die and went to shut the machine off and it would not move. She called the foreman Mr. Fountain and "he fixed at it and oiled it," and he said: "It is all right go ahead," she resumed work at the machine and directly after that it came down on her hand. When asked to tell how it happened, she replied: "That's all I can say what I have said, I had put in the die and started the machine and shut it off, and the first thing I knew my hand was caught." She further stated in detail that she had worked the lever, as she ordinarily did, at the time of her injury.

Charles Grap, who was an employee of the defendants at the time of the accident, testified that he had operated the

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machine on several occasions and that it was not in perfect order, that the clutch which held up the platen was worn and permitted it to slide down. That "you may shut her off 19 or 20 times all right and the twenty-first time she will slide and come all the way down," and also said that after he saw it slip several times he was in fear of his hand as much as the one that was hurt.

There was evidence of a contrary tenor as to many of the subjects we have mentioned. Mr. Lowenthal denied that the appellee had ever informed him that the machine was out of order or that the platen on it sometimes fell down unexpectedly, and he asserted that the machine was in good order and did its work well when properly managed, and his evidence as to the character of the machine was corroborated by other witnesses. In view however of the evidence to which we have already referred the learned Judge below could not properly have granted the defendants' first prayer.

Nor could the Court, in view of the testimony of the appellee and her witness Grap, have properly granted the defendants' second prayer which instructs the jury as matter of law that she was guilty of such contributory negligence as to debar her from a recovery in the case.

Finding no error in the rulings of the Circuit Court on the prayers we will affirm the judgment appealed from.

Judgment affirmed with costs.

THE MARYLAND, DELAWARE AND VIRGINIA
RAILWAY COMPANY *vs.* JAMES
H. BROWN.

Master and Servant—Collision with Runaway Engine—Evidence as to Defects in Engine—Proof of Diminished Earning Capacity—Custody of Live Engine Left Standing on Track—Evidence of Usage of Railways—Admission Without Objection of Incompetent Testimony—Evidence of Defect Existing Before Accident—Assumption of Risks by Servant—Instructions to the Jury.

On the trial of a case wherein it was alleged that plaintiff was injured in consequence of defendant's failure to supply a safe engine for use on its road, the plaintiff was asked to describe the type of the engine in question. He replied: "I cannot exactly tell what type she was; the only thing I can tell you is that she was old and worn out apparently when they got her." *Held*, that this answer is fairly responsive to the question, and a motion to strike it out was properly overruled.

In an action to recover damages for personal injuries caused by defendant's negligence, it is competent to show how the injuries affected the earning capacity of the plaintiff by evidence of what his earnings were before the injury and what he was capable of earning, and did earn, afterwards.

When the question is whether the defendant railway company was or was not negligent in its management of live engines left standing on a side track, evidence as to the particular custom or usage of that defendant in such management is not admissible, since that custom might be either careful or negligent, and in itself does not aid in determining the question at issue.

When the injury constituting the cause of action resulted from a runaway railway engine, a witness cannot be asked to state the custom of railroad companies as to leaving engines in the yard with steam up. Such question is too vague, and is not limited to the custom of well-conducted roads.

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When defendant's locomotive engine, which had been left standing alone on a side track, ran away and collided with an engine on which plaintiff was serving, the defendant company's master mechanic cannot be asked to state how the accident happened, when he did not examine the runaway engine before the accident, and did not see it at the time, and only examined it after it had been wrecked by the collision.

Plaintiff, a locomotive engineer on defendant's road, was injured in August by collision with an unmanned runaway engine. He testified that in the previous July he had operated the latter engine; that it was old, and in bad shape, and that the throttle-bar would work open and put it in motion. *Held*, that this evidence is admissible without proof that the defect continued to exist down to the time of the accident. Such defect is continuous unless repaired, and it was for the defendant to show that repairs had been made.

A servant assumes the risk of dangers incident to the service which cannot be avoided by the exercise of ordinary care on the part of his employer, but he does not assume the risks incident to the work as conducted in accordance with the individual methods of the employer, if these methods are negligent.

When a locomotive engine which had been left standing alone with steam up on a track, escapes and causes injury, it is ordinarily a question for the jury to determine whether the railroad company had exercised due care in the custody of the engine.

It is the duty of a railroad company to adopt and enforce reasonable rules for the inspection of its engines and for their safe custody while left under steam on a side track.

Although incompetent evidence was admitted to prove some particular fact, yet the judgment will not for that reason be reversed if the same fact was afterwards proved by competent evidence.

When incompetent evidence has been admitted without objection it will be treated as properly in the case.

One of the counts of the declaration in this case charged that the defendant company was negligent in failing to provide reasonably safe equipment for the performance of work by

its employees, and another count that the defendant had failed to exercise due care in the inspection of the equipment. The plaintiff's evidence at the trial tended to show that a locomotive engine, at the time it was bought by the defendant, was an old one; that subsequently it was in bad condition; that its throttle bar would work open; that this defect existed a month before the accident in question; that the engine was left standing alone on a side track with steam up and, escaping, caused injury to the plaintiff. *Held*, that defendant's prayers instructing the jury that under the pleadings and evidence, the plaintiff was not entitled to recover were properly refused, since there was evidence that the defective condition of the engine could have been discovered by inspection, and also that due care had not been exercised in its original selection.

Held, further, that defendant's prayers asserting that the engine was in good condition when placed on the side track, and that there was no evidence to show that it was defective, were erroneous, as was also a prayer which ignored defendant's non-delegable duty to provide safe equipment.

Held, further, that a prayer which denied the right of the plaintiff to recover if he continued in the service of the defendant, after knowledge of the defect in the engine, was properly rejected, since the plaintiff was justified in assuming that such a patent defect as that which the evidence showed to exist in the engine, would be discovered under any reasonable system of inspection, and would be promptly remedied.

Decided January 12th 1909.

Appeal from the Court of Common Pleas of Baltimore City (SHARP, J.), where there was a judgment on verdict for the plaintiff for \$3,000.

Plaintiff's 2nd Prayer.—The jury are instructed that it is the duty of the employer to use due and reasonable diligence, having respect to the nature of the service of the employed, to provide suitable appliances and instrumentalities for doing the work. And if the jury find from the evidence

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that at the time of the accident and injury to the plaintiff, he was in the service of the defendant as a locomotive engineer, driving a locomotive to which a train of cars was attached from Rehobeth Beach, Delaware, to Love Point, Maryland, and whilst so engaged on the 6th day of August, 1905, a collision occurred between said engine so driven by the plaintiff, and another engine unmanned, the property of the defendant, and running wild on the same track on which the plaintiff was operating his engine, and that by reason of such collision the plaintiff was injured, and that such collision occurred because said runaway engine was unsafe and unfit for the uses and purposes to which it was applied by the defendant under all the evidence in this case, then if the jury further find that the plaintiff was without negligence or want of care on his part in the premises directly contributing to the happening of the accident and injury, and that such accident and injury to the plaintiff was directly caused by the negligence and want of care in the premises of the defendant, the plaintiff is entitled to recover. (*Granted.*)

Plaintiff's 3rd Prayer.—If the jury shall find a verdict for the plaintiff, then in estimating the damages they are to consider his health and condition before the injury complained of, as compared with his present condition in consequence of said injury, and how far, if at all, it is calculated to disable him from engaging in those employments for which, in the absence of such injury, he would have been qualified, and also the physical and mental suffering, if any, to which he was subjected by reason of said injury and to allow him such damages as in the opinion of the jury will be a fair and just compensation for the injury which he has sustained. (*Granted.*)

Defendant's 1st Prayer.—The defendant prays the Court to instruct the jury that there is no evidence in this case legally sufficient to show that the defendant failed in any legal duty owing by the defendant to the plaintiff and that, therefore, under the pleadings and evidence their verdict must be for the defendant. (*Refused.*)

Defendant's 2nd Prayer.—That there is no evidence in this case legally sufficient to entitle the plaintiff to recover and that, therefore, under the pleadings and evidence herein the verdict must be for the defendant. (*Refused.*)

Defendant's 3rd Prayer.—That if the jury find that the locomotive called in the testimony "runaway locomotive" was standing on the siding on the day the injuries were sustained by the plaintiff, as testified to by the defendant's witnesses, and that the said locomotive was in charge of the defendant's employecs, as testified to by the defendant's witnesses, and that the said locomotive ran away and that the said running away was occasioned by the neglect or carelessness on the part of those placed in charge of the same by the defendant, then their verdict must be for the defendant. (*Refused.*)

Defendant's 4th Prayer.—That if the jury shall find that the plaintiff was in the employ of the defendant in July, 1905, as engineer and that as such engineer he ran Engine No. 1, as testified to by him, and that in running said engine he discovered that she was defective, in the manner testified to by him, and that notwithstanding such discovery he remained in the employ of the defendant until August 6th, 1905, and that on said last mentioned day he was injured in the manner testified to by the plaintiff and his witnesses, that engine No. 1 ran away by reason of the defect aforesaid, the plaintiff is not entitled to recover under the pleadings and evidence and their verdict must be for the defendant. (*Refused.*)

Defendant's 5th Prayer.—That if the jury shall find that on August 6th, 1905, the plaintiff was in the employ of the defendant in the capacity of engineer, and that late in the afternoon of said day was bringing, in said capacity, one of the defendant's trains to Love Point, and if they shall further find that engine No. 1 on August 6th, 1905, was in good order; that on the morning of that day she was moved by the witness Exeter to the water tank, and then returned to the side track; that after reaching said track, said witness turned off the steam by closing the throttle valve, put the reverse bar

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in the centre, chocked her wheels and then left her in charge of the hostlers; that said hostlers were competent employees; that said engine stood on said side track until late in the afternoon of August 6th, then their verdict must be for the defendant, notwithstanding they may further find that late in said afternoon said engine started off in the manner testified to by the plaintiff's witnesses and collided with the defendant's train aforesaid, on which plaintiff occupied the position of engineer, thereby injuring the plaintiff. (*Refused.*)

Defendant's 6th Prayer.—That if the jury find from the evidence that the plaintiff sustained the injuries testified to by the plaintiff's witnesses, and that the injuries were caused by a defective condition of the locomotive, called in the testimony "runaway locomotive," and if they find that the said defective condition was due to a latent or hidden defect not discoverable by any reasonable or ordinary inspection, then their verdict must be for the defendant. (*Granted.*)

Defendant's 7th Prayer.—That an employer is bound to use reasonable care to procure sound machinery and appliances for his employees, but it is not bound to keep such machinery and appliances free from defects. (*Refused.*)

Defendant's 8th Prayer.—That if the jury find from the evidence that the injuries to the plaintiff were the result of an inevitable accident, then their verdict must be for the defendant. (*Granted.*)

Defendant's 9th Prayer.—That if the jury find from the evidence that the plaintiff sustained the injuries, as testified to by the plaintiff's witnesses, and that the injuries were caused by a defective condition of the throttle valve of the locomotive, called in the testimony, "runaway locomotive," and if they find that the defective condition of the throttle was due to latent or hidden defects not discernable by any reasonable or ordinary inspection, then their verdict must be for the defendant. (*Refused.*)

Defendant's 10th Prayer.—That inasmuch as the evidence shows that on August 6th, 1905, the plaintiff was employed by the defendant in the capacity of engineer in running its

engine and inasmuch as the evidence further shows that on the morning of August 6th, 1905, the witness Exeter also in the employ of the defendant in its machine shops, placed engine No. 1, then in good condition, on the side track at Love Point, turned off the steam by closing the throttle valve, put the reverse bar in the centre, chocked her wheels as testified to by him, and then left her in charge of the hostlers who were competent employees, and that said engine stood on said side track until late in the afternoon of the 6th day of August, and that said side track ran up grade towards and entered the roundhouse track by a switch, and that the roundhouse track entered the main track by a switch, and that said engine in order to get on the main track had to run through said two switches, their verdict must be for the defendant under the pleadings and evidence. (*Refused.*)

Defendant's 11th Prayer.—That inasmuch as the evidence shows that engine No. 1 was placed on the side track by the witness Exeter, her steam shut off by the closing of her throttle valve, her reverse bar in the centre and her wheels chocked, and inasmuch as there is no evidence to show that engine No. 1 was defective in such a way that she could start off in the condition and under the circumstances in which she was placed by the witness Exeter on said side track, and inasmuch as the evidence shows that the defendant employed competent employees and placed them in charge of said engine, their verdict must be for the defendant under the pleadings and evidence in this case. (*Refused.*)

Defendant's 12th Prayer.—The jury are instructed that the defendant is not an insurer of the lives or limbs of its employees, but is bound to use ordinary care for their protection; that the plaintiff when he accepted employment with the defendant assumed all risks ordinarily incident to the business as conducted by the defendant; that among such risks is the negligence of co-employees; that Exeter and the two hostlers are co-employees of the plaintiff, and if the jury find that engine No. 1 ran away by reason of the negligence of said Exeter and the two hostlers, or any of them, the plain-

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tiff is not entitled to recover, and their verdict must be for the defendant, provided that the jury shall find that the defendant used ordinary care and caution in supplying a sufficient number of hostlers to watch and attend engine No. 1 placed on the side track in question, under the conditions and circumstances testified to by the plaintiff's witnesses. (*Granted.*)

Defendant's 13th Prayer.—That the defendant is not an insurer of the lives or limbs of its employees, but is bound to use ordinary care for their protection; that the plaintiff when he accepted employment with the defendant assumed all risks ordinarily incident to the business as conducted by the defendant, which he knew or could have known by the use of ordinary care, and if the jury shall find that the witness Exeter on August 6th, 1905, placed engine No. 1 on the side track; that he chocked her wheels as testified to by him; that he closed her throttle valve and put the reverse bar in the centre and then left her in charge of two hostlers, as testified to by him; that said side track ran up grade to and joined the roundhouse track by a switch, and that the roundhouse track joined the main track by a switch, and that said engine No. 1 could only get into the main track by running through said two switches; that engine No. 1 stood as so placed until late in the afternoon of August 6th, their verdict must be for the defendant under the pleadings and evidence in this case, unless the jury shall find that the defendant did not use ordinary care and caution in supplying a sufficient number of hostlers to watch and attend to her. (*Refused.*)

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER and WORTHINGTON, JJ.

Ralph Robinson and Edward Duffy, for the appellant.

William Colton, for the appellee.

PEARCE, J., delivered the opinion of the Court.

The appellee, who was employed by the appellant as an engineer to operate certain of its trains over its railroad between Love Point, in Queen Anne's County, Maryland, and Rehoboth, Delaware, brought this action to recover damages for injuries received by him in a head-on collision between the engine and passenger train which he was running at the time, and another engine with a tender and coal car attached which was unmanned and running wild on the same track, the railroad being a single track road. The collision occurred about eight o'clock in the evening of August 6th, 1905, at a point a few miles from the western terminus of the road at Love Point, and almost immediately after crossing Kent Island Narrows, the stream which separates Kent Island from the main land of Queen Anne's County. In crossing this stream the plaintiff had reduced the speed of his engine and train to about ten miles an hour in accordance with standing instructions, and was just getting under headway again when he and his fireman caught sight of the runaway engine about two engine lengths away when it was impossible to do anything to avert the collision or break its force, and the result was that the plaintiff was thrown from his engine unconscious, and was severely injured; that he was not able to do anything for over a year and incurred a bill for medical services of \$100; that he was scalded, cut on the head, and had his teeth knocked out and still suffers much and constant pain; that he attempt'ed, after the lapse of a year, to run a train on defendant's road, and did so for about a month, when he was unable to stand it, and was obliged to give it up, and took up firing for the United Railways and Electric Company at the Pratt Street Power House, which is much lighter work than running a train. His wages as engineer were \$80 a month, and his pay as fireman for the United Railways was two dollars and a quarter per day and he began that work in June, 1907. Before that he kept a livery stable, but made not over a dollar a day at that, and he only kept this stable about six months in all. The engine he was running at the

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time of the collision was known as No. 3, and it was properly manned and lighted. The runaway engine was known as No. 1, and was unlighted and unmanned. The jury found a verdict for the plaintiff for \$3,000, and from the judgment on that verdict the defendant has appealed. There are twelve bills of exception in the record, of which, eleven are to rulings on evidence, and one to the ruling on the prayers.

There are three counts in the declaration. The first count charges as the cause of the plaintiff's injuries that the defendant did not exercise due and ordinary care in the selection, employment, and retention of reasonably competent and proper co-employees with whom the plaintiff was required to work.

The second count charges the defendant with negligence in failing to provide reasonably safe and proper tools and equipment for the performance of the work required of its servants, and exposed him to unnecessary risk and danger while so employed, in that while running his own train on defendant's road on Aug. 6th, 1905, his said train, because of the unfit and unsafe condition of another train on said road, collided with said last mentioned train, and he was injured in consequence thereof.

The third count charges that the defendant neglected to exercise due and ordinary care in the inspection of the equipment of the railroad, in and about which the plaintiff was required to work, in consequence of which the plaintiff's train collided with an unmanned and wild engine on the same track, causing the injuries complained of.

The first exception arose in this way: The plaintiff, after testifying to the facts of the collision, said that he had run Engine No. 1 before the collision, and being asked what was her condition at that time, replied that she was not in very good condition. The defendant moved to strike out that question and answer, and the Court said: "You will have to bring it nearer than that—say within a week or so." Plaintiff's counsel replied: "I will cover that," and the Court said: "It will be admitted subject to exception." The plain-

tiff then testified as follows: "I think it was in July I ran her, the latter part of July to the best of my recollection. It was in bad shape; it was an old engine, and when you ran her on the road, and you happened to take your hand off the throttle, her throttle bar would work open. The throttle bar is what gives her life; it is what makes her move; when it opens it puts her in motion." The court here asked: "Why did it open?" and he replied: "The throttle was old and worn out, and the spring was weak to the best of my judgment." He was then asked to describe the type of engine No. 1, and answered, "I cannot exactly tell what type she was; the only thing I can tell you is that she was old and worn out apparently when they got her."

Defendant moved to strike out the last answer as not responsive to the question and the Court refused the motion. We do not think it can be said this answer was not fairly responsive to the question. This man was not a mechanical engineer trained or experienced in the construction of locomotives. He was a farmer first then foreman of a force for the defendant, and in 1905 became one of its locomotive engineers. His answer imported that it was an old type, being as he added, worn out when the defendant got it. Moreover this answer could not work any injury to the defendant, because the next witness John F. Hess a fireman of defendant, and assistant machinist, testified without objection, that it was "an old engine, about the type used and operated on the P., B. & W. R. R. many years ago." There was therefore certainly no reversible error in this exception. The second, third and fourth exceptions all relate to proof of the plaintiff's earning capacity as affected by his injuries and may be considered together.

Having previously described his injuries, and stated that in consequence he was unable to pursue his former occupation, or to perform as hard work as before, he was asked in the second exception, what income, if any, he had derived from any source since the accident. He replied that he was not able to do any work until June, 1907, when he went to

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firing for the Electric Railways at a Power House, which is light work. In the second exception he was asked what he received for this work, and he replied two dollars and a quarter a day. In the third exception he was asked what income, if any, he had before June, 1907, and he replied only from a livery stable he kept for about six months which gave him a bare living, about a dollar a day. It was certainly proper for the jury to know how his injuries affected his earning capacity, and there could be no better evidence of this than a comparison of what he had testified were his earnings at the time of his injury, with those he was capable of earning and did receive afterwards. It was the privilege of defendant upon cross-examination or otherwise to show, if it could, that he did, or could, with proper effort, have earned more than he testified, and we can perceive no error in these rulings.

The fifth, sixth and seventh exceptions relate to the exclusion of evidence offered by defendant as to its custom in the conduct of its business.

The defendant's Assistant Master Mechanic, Louis Exeter, being called for the defendant, testified that on the morning of the accident he repaired the injector of Engine No. 1, which the hostler reported out of order and that when this was done she was in first-class order; that he then backed her to the siding from the main track to the roundhouse, chocked her, put a bar in the centre and left her; that he looked at her again about 5.30 that evening and her throttle bar and reverse bar were all right and she was in first class condition for service; that the duties of a hostler are to clean and fire the engines, and keep them steamed and watered, and to be around the roundhouse and watch the locomotives; that some hostlers look after five, some after ten and some as many as thirty engines, but on that day, at that time, there was only one to look after.

He was then asked "Is he expected to stay on the engine?" This was objected to, but was answered "No," after objection was made, and on motion this was stricken out. This was

the fifth exception. He was then asked "What is the custom down there as to locomotives when they are brought in; what is done with them; what is done as to their steam and how is their steam kept?" This was the sixth exception. He was further asked: "What was the custom as to railroad companies leaving engines in the yard when they are not in actual service, with steam on them," and this is the seventh exception.

It would hardly be necessary to cite authority to sustain the rulings on the fifth and sixth exceptions, since the usage or custom there inquired into was merely the custom of the defendant. Its custom might be either careful or negligent, and, in itself, could not aid the jury in determining whether the defendant was or was not negligent in its management of live engines left standing on a side track. That was to be properly determined from the evidence as to how that engine was cared for, under such instructions as should be sought and granted by the Court. The servant does not assume the risk attending the work as conducted in accordance with his employer's individual methods. *Labatt on Master & Servant*, sec. 53, page 137. He assumes only those which cannot be obviated by the exercise of ordinary care, *idem*, sec. 2, page 4.

The question which gave rise to the seventh exception is not in our opinion properly framed. It is not proposed to show a universal, or even a general custom, prevailing in railroad management. It is so vague as to leave it in doubt whether it was intended to apply to all, or only to some of the vast number of railroads in this country. It does not limit the question to well conducted railroads, and would permit the jury to adopt a standard of care based upon the custom of other roads, whether careful or negligent. The requirement that the inquiry as to usage or custom in such cases should refer to well conducted railroads, was emphasized in *Benson v. N. Y. N. H. & H. R. R.* by the Supreme Court of Rhode Island, in 49 At. Rep. 691, and also in *L. & N. R. R. v. Jones*, by the Supreme Court of Ala., 30th South Rep. 589. In the latter case the Court said: "A charge propos-

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ing to make a standard test of duty by the usage of eight railroad companies was invasive of the province of the jury." We find no error in these rulings.

The eighth and ninth exceptions present the same question substantially and differ but little in principle from the exceptions just considered. James E. Willey, one of the defendant's locomotive engineers, had testified that he ran No. 1 from Rehoboth to Love Point the day before the accident; that the throttle did not leak, and he had no trouble with it; and he then stated what he did with this engine when he came in from that run. He was then asked: "Is it the practice *down there* for engineers when they bring their locomotives in to do just what you have done in this case?" And again he was asked: "State whether or not an engineer is expected to report the condition of his engine, if it is in bad condition when he brings it in?" Both questions were objected to, and the witness was not allowed to answer.

What has been said of the three preceding exceptions is applicable to these, and in addition thereto both are leading questions. The last really asks for a rule of the company, and the best evidence would be the rule itself, to be followed by proof of compliance on that occasion with the rule. Notwithstanding this ruling however, the record shows that after it was made, this witness testified "that witness received, and his instructions were, to report the condition of the engine, and that he reported it to the repair shop," and the record also shows that before the eighth exception he testified without objection that, "he reported her condition was all right for service," so that the defendant received the full benefit of the question in the ninth exception.

Marion F. Young testified for defendant that he was its assistant Master Mechanic, and saw Engine No. 1 when she was delivered to defendant in May or June, 1905, and that she was in good condition at the time of the accident. He then testified at considerable length as to the construction of Engine No. 1, using a sectional blue print of a similar locomotive for the purpose of illustration, and testifying that

when the reverse bar is in the centre (as Exeter had testified he left it when the engine was placed on the side track), the locomotive could not move because the ports through which the steam is let into the steam chest are closed, and that the opening of the throttle would not open the ports. He was competent to so testify and the testimony was proper for the jury. He was then asked: "Do you know how this accident happened?" and the plaintiff objecting, he was not permitted to answer, and this constitutes the tenth exception. We have carefully examined the testimony of this witness to discover the foundation for this question. There is not a particle of evidence when this witness saw this engine, or examined it, between its arrival and this accident. The only evidence is that he examined the steam pipes of this engine after the accident, leading to the throttle, and they were in good condition. He said: "She was not just old junk, and that the company was keeping some of the cross heads and valves which they may use some day." There was no evidence that he was near the engine, or that it was within his sight when it escaped. But the defendant contends that he should have been allowed to answer this question, "both because he *may* have been present at the time No. 1 left, or because he found out the reason she left by an examination of her after the accident." If he was present when she escaped, that fact should have been affirmatively shown, as the foundation for the question, though we are not to be understood as saying that this alone would be a sufficient foundation without a full statement of all that he saw at the time of the escape, and we cannot agree that this post-mortem examination of an engine wrecked by such a collision, could enable this witness to testify that he *knew* the cause of the accident. It is perhaps possible that as an expert machinist, he might *form some opinion* of the cause of the accident, but we are not prepared to say that the expression of such an opinion would afford the jury any rational basis for a conclusion by them, and in our opinion the ruling was correct.

At the close of all the testimony the defendant moved to

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strike out the testimony of the plaintiff, as to the condition of the engine in July, 1905, and the defect in the throttle bar, all of which was admitted subject to exception; also to strike out the testimony of John A. Roe, the fireman on plaintiff's train at the time of the accident, to the same effect as Brown's, relating to the condition of the throttle. The record shows that Roe's testimony was not admitted subject to exception and therefore cannot be stricken out. Nor do we think the testimony of either should be. We think this testimony brings the inquiry sufficiently close to the accident in point of time, if there is no other objection to its admission.

The defendant contends that proof of defect before an accident cannot be received without offer of proof to show that the thing remained in the same condition down to the moment of the accident. In discussing this subject, Mr. Wigmore in vol. 1, sec. 437 of his work on Evidence, says: "That no fixed rule can be prescribed as to the time, or the conditions, within which a prior or subsequent existence is evidential, is sufficiently illustrated by the precedents from which it is impossible (and rightly so) to draw a general rule. They may be roughly grouped into two classes—those in which the evidence has been received without any preliminary showing as to the influential circumstances remaining the same in the interval (thus leaving it to the opponent to prove their change by way of explanation in rebuttal) and those in which a preliminary showing is required. Whether it should be required, must depend entirely on the case in hand, and it is useless to look to or wish for any detailed rules. * * * The matter should be left entirely to the trial Court's discretion."

This is in accord with what was said in *Brooke v. Winters*, 39 Md. 509, that, "whether the proposed proof of facts subsequent to the suit were admissible or not did not depend upon the time of their existence *before* or after the suit, but upon their relevancy to the issue and their capability of explaining it. The *mere fact* that such evidence referred to

circumstances subsequent to the suit, did not, *per se*, render it collateral and inadmissible."

We think the discretion of the Court was not abused, or mistakenly exercised, in refusing to strike out this evidence. Such a defect is in its nature continuous unless repaired. If repaired it was in defendant's power to show such repair, and this it did not do. The witness, Exeter, testified that he repaired the injector but he discovered no defect in the throttle and made no repairs upon it. The witness, Young, who succeeded Exeter as assistant master mechanic, made no repairs and discovered no defect. They both denied the existence at any time of such defect, and their denial went to the jury with the plaintiff's affirmation.

Young testified that he had known this engine a long time when she was in the service of the P. B. & W. R. Co., and that she was built in 1881. She was purchased from that company for defendant by Mr. Strathner, who was defendant's Master Mechanic at the time of trial also, but he was not produced as a witness. Upon a review of the whole situation we cannot doubt the refusal to strike out this testimony was correct. This brings us to the ruling on the prayers of which the plaintiff offered three, and the defendant thirteen.

The plaintiff's first prayer was refused, and is not in the record, and his second and third were granted, the defendant's special exceptions thereto being overruled.

The defendant's sixth, eighth and twelfth prayers were granted, and its first, second, third, fourth, fifth, seventh, ninth, tenth, eleventh and thirteenth were refused, and the defendant excepted to the overruling of its special exceptions to plaintiff's second and third prayers, and to the granting of these prayers, and also to the rejection of its own refused prayers. We are told in the plaintiff's brief that his first prayer was founded on the doctrine of *res ipsa loquitur*, but that prayer is not before this Court.

The defendant's first and second prayers asked the Court to instruct the jury that the plaintiff could not recover under the pleadings and evidence.

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The defendant's tenth and eleventh prayers attempt to recite the evidence *as undisputed*, and assert that the verdict *must be* for the defendant under the pleadings and evidence, thus withdrawing the case from the jury.

If the first count in this declaration, which charges negligence in the selection and retention of reasonably competent co-employees, were the only count in the declaration, this question would be raised, but the second count charges negligence in failing to provide proper tools and equipment, and the third count charges negligence in failing to properly inspect its equipment. The tenth and eleventh prayers should have been confined to the first count. Moreover both these prayers are defective in assuming facts which it was for the jury to find. The tenth prayer asserts that Engine No. 1, when placed on the side track on Aug. 6th, was "*in good condition*," whereas there was evidence tending to show it was not in good condition. The eleventh prayer asserts that "there was no evidence to show that Engine No. 1 was defective in such a way that she could start off, in the condition and under the circumstances in which she was placed on the track by Exeter." We think, notwithstanding Exeter's testimony on that point, that it was still a question for the jury whether the actual starting, which was proved, was due to the negligence of the defendant either in the original purchase of a defective engine, in the failure to make proper inspection, or to keep a proper watch on the engine while standing on the track, and these prayers were in our opinion properly rejected.

The defendant relies chiefly to sustain its first and second prayers upon the language adopted in *South Balto. Car Works v. Schaeffer*, 96 Md. 105, where there was merely a sudden and unexplained breaking of a piece of machinery, and the Court held that in an action by a servant against the master this did not justify the presumption of negligence on the master's part, "*when there is no evidence that defects in it could have been discovered by inspection, or that due care had not been exercised in its selection.*" And the Court said:

"To punish the defendant because it cannot explain the cause of the break, is not to punish it because it has done wrong, but because it does not know what we wish to find out." But in the case before us the plaintiff had offered evidence tending to show a defect, which if it existed when the engine was purchased, could have been discovered by a proper examination, or which if it was brought about after the purchase, could have been discovered by any proper system of inspection. In *Moran's Case*, 44 Md. 283, where an employee was injured by an explosion occasioned by the defective and worn out condition of the boiler the master was held liable for the negligence of its master mechanic to whom had been delegated the power to select and purchase the engine. Strathner, in that capacity, purchased this engine, and he was not called to state what examination, if any, he made by which the defect, if it then existed, could have been discovered, though it had been purchased only about two or three months before, and there was testimony that she was at least 24 years old. Exeter himself testified that she was "very old." John F. Hess, an extra machinist of defendant, testified that she was an old engine of a type operated many years ago on the P. B. & W. R. R., and he also testified that the leaking of the throttle might start an engine "because the escape from the steam through the lubricator in such case could gain access to the cylinder." This was in direct conflict with Exeter's testimony on that point.

In *Crawford v. United Railways*, 101 Md. 417, this Court said: "It is not enough that the master employs competent servants. * * * He must exercise reasonable care and supervision over them and see that they do their duty. And when the business of the master is such that the safety of one servant depends upon the way in which other servants do their work, it is the duty of the master to *adopt, promulgate, and enforce* reasonable and sufficient rules to protect and promote the safety of its employees exposed to danger." There is no evidence of any *system* of rules here either for inspection

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of engines or for their safe custody while under steam on a side track.

This case has its parallel in the case of *Lafferty v. Southern Pac. R. W.*, 15 U. S. Appeals, 195, where a brakeman was killed in a collision with another engine of defendant which in some unexplained way escaped from a side track to the main track, but the present case is stronger because of the evidence of a defect which might have caused the engine to start. The Court said that if live engines, "if put in motion of themselves, or by the act of careless, thoughtless, or evil disposed persons," should escape on the main track, "they would in the very nature of things expose to unusual peril and hazard all the employees of the company in charge of other engines and cars upon the main track, and that it was for the jury to determine as a question of fact whether the employment of Riley as a watchman, *with the additional duties imposed upon him*, was a reasonable precaution upon the part of the company." The evidence in this case is that the hostler who acted as watchman of the engines had other numerous duties assigned him, and in *Lafferty's Case, supra*, the Court left it to the jury to determine whether one man, no matter how competent, careful, and trustworthy, could properly guard the two engines spoken of in that case while performing the duty of wiping them and putting them in order.

A very strong and well reasoned case is referred to in *Lafferty's Case, supra*, viz, *Smith v. N. Y., Susq. & West. R. Co.*, 46 N. J. Law, 7, where a railway company was held liable for injuries caused by a collision resulting from the movement of certain cars which had been left on a siding in such a situation that a wrongdoer could readily throw them on the main line. It is true that the action in that case was by a passenger, but while recognizing the general distinction, the Court in *Lafferty's Case*, found the citation in point; in that case the R. R. Co. left a loaded car coupled with two empty cars, at a safe distance on a siding inclined towards the main track with the brakes all set, and a railroad tie

placed beneath the wheels of the loaded car. These cars got upon the main track but there was no direct evidence as to what caused them to move.

In the case before us the grade was up from the side track, but the engine was under steam and able to move up grade. In the *Smith Case*, CHIEF JUSTICE BEASLEY was asked to charge, "that if the jury are satisfied from the evidence that on Sunday evening, the stone car with which the passenger car afterwards came into collision on that evening, had been made fast by means of a bar and brakes, at a safe distance from the main track, and incapable of motion towards the same, without the removal of the bar and brakes, and the application of external force, and there was no want of due diligence in stopping the train, then the defendant is not guilty of negligence, and there can be no recovery." Also he was requested to charge "that when an obstruction is placed upon a railway by a stranger, by accident or design the company is not liable for the consequences, unless its agents have been remiss in not discovering it." He refused both instructions and sent the case to the jury, giving as his reason therefor that "each of them, if adopted, committed the Court to the doctrine that the action could not be supported if the cars in question were so securely fastened, that but for the intervention of extraneous force they would not have got upon the main track, or if that, they would not have done so without the unlawful action of human agency * * * such a question is essentially one for the jury. The judge could not be properly called upon to pass any opinion as to the sufficiency of the means employed, nor that such means were legal if they would have held the cars in position, without the application of external force."

Upon these principles and authorities we think the defendant's first and second prayers were properly refused. The plaintiff's second prayer required the jury to find that engine No. 1 was unsafe and unfit for the uses to which it was applied by the defendant under all the evidence, and that the plaintiff was not guilty of any want of due care on his part,

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and embraced all the other requisites of recovery. The special exception thereto for the want of evidence that it was unsafe and unfit for the uses to which it was applied, was properly overruled and the prayer was properly granted.

The plaintiff's third prayer was the usual damage prayer, and it follows from what we have said in discussing the second, third and fourth exceptions that the special exception thereto on the ground that there was no evidence to sustain it, was properly overruled, and that the prayer was properly granted.

The defendant's sixth prayer, which was granted, gave it the benefit of the defence of a latent defect in the engine not discoverable by any reasonable or ordinary inspection. Its eighth, which was granted, gave it the benefit of the theory of inevitable accident, and its twelfth which was also granted, instructed the jury properly that the company was not an insurer of the lives or limbs of its employees, and was only bound for ordinary care for their protection. It also instructed the jury that the plaintiff assumed all risks ordinarily incident to the business *as conducted by the defendant*. We have already intimated that this proposition is too loosely stated and we must not be understood as sanctioning it.

The defendant's third prayer wholly ignored the alleged defect in the engine as a possible cause of its escaping and was properly refused. From what we have said in discussing the defendant's first and second prayers, it follows that the defendant's fifth prayer was properly refused. Its seventh prayer ignored the non-delegable duty to provide safe tools and equipment, and if granted must have misled the jury. The defendant's ninth prayer was fully covered by the granted sixth prayer, and there was no error in refusing it.

The defendant's thirteenth prayer is in part the same as the twelfth, but it also instructed the jury that if they found Exeter placed the engine on the side track in the manner testified to by him and left her in that condition, on an up grade, and that she could only get on the main track by running through two switches, then their verdict must be for the

defendant unless they found sufficient hostlers were not supplied to watch said engine. That ignores the evidence as to the defective throttle, as well as the theory of the application of external force starting the engine, and it would have been error to grant it.

The defendant's fourth prayer is based on the theory that if the plaintiff knew of the alleged defect in the engine the day that he ran her, and notwithstanding such knowledge continued in the service of defendant until the accident happened, then he was not entitled to recover. He could however well assume that such a patent defect would be discovered under any reasonable system of inspection, and would be remedied promptly. The prayer should have required the jury to find that he knew such defect continued to the day of the accident. Had he himself used this engine at the time of the accident without examining to see if the defect still existed, and had been injured in consequence, there might be some ground for the granting of a prayer going to the extent we have suggested. But we are not prepared to extend the principle invoked to the facts of this case.

We shall request the reporter to set out all the prayers in the case, that there may be no misapprehension as to their disposition.

We think the granted prayers gave the defendant all to which it was entitled, that the case was fully and fairly presented by them to the jury.

Judgment affirmed with costs to the appellee above and below.

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Syllabus.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE *vs.* V. RUSSELL RILEY.

Carriers—Injury from Runaway Car to Passenger Standing on Rear Platform of Another Car on the Same Track—Contributory Negligence—Instructions to Jury—Evidence.

In an action by a passenger against a carrier to recover damages for a personal injury, it is not necessary that the defense that the passenger was guilty of contributory negligence should appear from the evidence adduced by the defendant. If the plaintiff's own evidence shows that he was negligent that is a bar to the action.

Consequently, in a case where the inference of plaintiff's contributory negligence could be legally drawn from his testimony, it is error to instruct the jury that from the fact of the injury to the passenger, a presumption arises that it resulted from the carrier's negligence, and that the passenger is entitled to recover unless the defendant shows that the injury could have been avoided by the exercise of ordinary care on the part of the plaintiff.

Plaintiff got upon the rear platform of defendant's electric railway street car, which was standing still, and just afterwards, while he was about to enter the car, in which there was room, and as the car started, an unmanned runaway car on the same track crashed into the platform on which the plaintiff was standing, facing towards the front and not aware of the danger, and injured him so severely that it was necessary to cut off one of his legs. *Held*, that since the jury could have found from the plaintiff's evidence that he was negligent in remaining on the platform when he had had time to go inside the car, it was error to instruct the jury that if they found that the plaintiff was a passenger on one of defendant's cars and was injured by a collision between that and another of defendant's cars moving on the same track, then the presumption is

that the injury resulted from the negligence of the defendant, and plaintiff is entitled to recover unless the defendant shows that said injury did not result from its negligence, or that the accident could have been avoided by the exercise of ordinary care on the part of the plaintiff.

The fact that a passenger stood on the rear platform of a street electric railway car when there was room for him inside the car, and was injured in consequence of being in that position, does not constitute contributory negligence as matter of law which bars a recovery of damages for the injury, unless that position on the platform exposed him to an obvious danger. Generally in such cases, the question whether the passenger was guilty of contributory negligence is one of fact for the jury.

When the plaintiff testifies that he was standing on the platform of a car only for a moment and was about to go inside, but before he could do so the injury to him happened, the defendant has no right to have the jury instructed that plaintiff cannot recover if he took an exposed and dangerous position on the car, and was injured by reason of his taking such position.

Evidence that before receiving the injury for which the action was brought, the plaintiff had made arrangements to go into a certain business is not admissible.

In such action, evidence that the plaintiff had married after the accident is not competent, but the admission of such evidence is not a material error in a case when the jury was properly instructed as to the measure of damages.

Decided January 13th, 1909.

Appeal from the Baltimore City Court (SHARP, J.), where there was a judgment on verdict for the plaintiff for \$10,000.

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS and WORTHINGTON, JJ.

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Joseph C. France and *J. Pembroke Thom* (with whom was *Edwin H. Brownley* on the brief), for the appellant.

William Colton, for the appellee.

THOMAS, J., delivered the opinion of the Court.

V. Russell Riley, appellee and plaintiff below, who lived at 648 Columbia Avenue, in Baltimore City, when returning from a visit to some friends in Pikesville, late at night on December 15, 1905, got off one of the cars of the appellant at the corner of North and Linden Avenues, to take a John Street car going to Columbia Avenue. It was cold, and he went into a drug store and got some cigars and walked up North Avenue smoking while waiting for his car, but not seeing one and seeing a Madison Avenue car standing near Wegner's restaurant or saloon, several doors below the corner, he hurried and got on it, and while he was on the rear platform of the car it was struck from the rear by what is called in the evidence a "runaway car," with no one in charge of it and when running rapidly on the same track in the same direction as the car he was on, and he sustained injuries which necessitated the amputation of one of his legs a few inches below the knee, and this suit was brought to recover for such injuries,

The grounds of the defense were that he was guilty of contributory negligence in standing on the platform of the car, and that he assumed the risks to which his position exposed him.

The trial resulted in a verdict and judgment in favor of the plaintiff for \$10,000.00, from which judgment this appeal was taken.

The record contains three exceptions to the rulings of the Court on the evidence, and one exception to the granting of the plaintiff's two prayers, the rejection of defendant's first, second, third, fifth, sixth, seventh, ninth, tenth and eleventh prayers, and the overruling of defendant's special exceptions to plaintiff's prayers. The only exceptions how-

ever relied on and pressed in this Court are the exceptions to the ruling of the Court on the evidence, and to the granting of plaintiff's first, and the rejection of defendant's sixth, ninth, tenth and eleventh prayers.

Plaintiff testified that: "He ran to get on the car and got on, but before he could throw his cigar away or get inside, some one jumped on the rear end of the car, and holloaed and pulled the bell and before he knew it there was an awful crash. The car was still when he got on. His position was on the back platform of the car facing the motorman, looking inside the car, about to walk in. He did not have time to throw his cigar away or get inside the car before someone jumped on and holloaed and at the same time rang the bell and before he knew it there was a crash." And on cross-examination he said he ran back of the car and got on because it was the last car that night going down, and that he still had the cigar with him; that he didn't have time to take any position, and had just gotten on the car, was standing facing—"I was looking inside the car;" that he was standing on the platform looking inside the car; that he guessed he was smoking; that he could not tell how many people were in the car; that he saw the conductor, who was standing up in the front part of the car; that no one else was there that he knew of; that the conductor was not on the back platform or at the back door; that he did not have time to see how many people were in the car, which was not crowded, and that "he guessed there was plenty of room inside." That he had been around cars a good deal in Baltimore for ten years, but never knew of any notice or sign in the cars warning people against standing on the platform because it was dangerous, and that "those so doing assumed the risk," but that he had seen signs prohibiting smoking inside the car, and that he knew how to read. That he didn't know whether it was Rosenheim who holloaed, but that somebody holloaed, and at the same time jumped on and pulled the bell; that "everything was all confusion at the time," and that he, plaintiff, was "about opposite the door then, about going in-

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side the car," and that he knew nothing about the runaway car until it struck the car he was in.

Plaintiff's witness, Herford, says that the car plaintiff was on was standing on Madison Avenue, in front of Wegner's Saloon, the fourth door from the northeast corner of Madison and North Avenues, and that he saw someone get on the car ahead of the plaintiff who went inside the car, and was about to take his seat when the accident happened; that the conductor was in the front part of the car, and had something in his hand, and witness thought he was writing; that he saw the runaway car pass the northwest corner, and saw plaintiff on the platform of the car that was struck; that he saw a man who came out of Wegner's saloon, get on after plaintiff, and that after witness holloed he jumped off. That plaintiff could have gotten inside the car and taken a seat; that Rosenheim got on the car a few minutes after plaintiff; that plaintiff was standing on the left hand side of the platform of the car facing the motorman; that witness holloed loud, and Rosenheim, the man who got on the car after the plaintiff, jumped off but he could not say positively how long Rosenheim was on the car before he jumped off; that he imagines that it was not more than a couple of minutes "if it was that much," it was a very short time.

Plaintiff's witness, Zimmerman, stated that he came out of Wegner's saloon and saw a car coming down Madison Avenue which stopped, and that he stepped on the car and at the same time plaintiff got on the car. That he, witness, went inside the car, and as he was about to take a seat on the right side he looked around and saw plaintiff standing on the left hand side of the rear platform, holding on to the rail; that the conductor was in the front part of the car writing something in a little book, but that there was no one else in the car, and that about half a minute later he heard some one jump up on the car and ring the bell, and he saw him jump off again, and that then the crash came, and witness found himself in the front part of the car where the conductor was; that the car that he was on was at a standstill when he got on

it, and after it was struck it went to about the middle of the square; that there was plenty of room inside the car, and that it was probably half a minute after the plaintiff got on the car before Rosenheim got on the car and pulled the bell, and that in the meantime plaintiff was standing on the platform holding to the rails, but that he "didn't know whether he was smoking or not."

Plaintiff's witness, Brenner, stated that he and Rosenheim came out of Wegner's saloon; that Rosenheim was waiting to go downtown, and he was going east on North Avenue; that they saw the car coming, and Rosenheim left him on the south side of the street, and he presumed he got on the car, and witness had gotten "diagonally across" Madison Avenue when he heard a shout, and looking back saw plaintiff standing on the platform and Rosenheim pulling bell rope, and before he could realize what happened, he saw another Madison Avenue car coming and there was a crash which carried both cars as far as the middle of the block; that the crash come immediately after pulling of the bell and the car was either still or had very little headway. That after the accident the platforms of the two cars were apparently smashed, and there was a tangle of the iron grating and the brake, "and plaintiff was down amongst them."

The plaintiff produced other witnesses whose testimony was to about the same effect as the evidence above stated, from which the jury could have found that at the time of the accident the car on which plaintiff was injured was either standing still or had just started, and that plaintiff was standing on the rear platform of the car; that there were very few people in the car; that the plaintiff had an opportunity to go inside the car, and that if he had done so, instead of remaining on the rear platform, he would not have received the injuries for which he now seeks to recover.

Defendant proved by its witness, Glenn, that he was conductor on one of the defendant's cars and saw the accident in which the plaintiff was injured; that he had been at work on the street cars for fourteen or fifteen years previous to the

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accident; that he took the car plaintiff was on from the place of the accident back to the barn; that that car and all other cars of the defendant had posted on them a sign forbidding people to ride on the steps or rear platform of the car, and stating that those who did so did it at their own risk; that these notices had on them, in big red letters at the top, the word "Warning."

Plaintiff's first prayer is as follows: "If the jury believed that the plaintiff was a passenger on one of the defendant's cars, and whilst being carried therein was injured by a collision between that and another of defendant's cars while moving on the same track, then the presumption is that the injury resulted from the negligence of the defendant, and the plaintiff is entitled to recover, unless the defendant shows that said injury did not result from its negligence or that the accident could have been avoided by the exercise of ordinary care on the part of the plaintiff."

By this instruction the jury were told that if they found the facts stated in the prayer, the plaintiff was entitled to recover unless the *defendant showed* either that the injury did not result from its negligence, or that the accident could have been avoided by the exercise of ordinary care on the part of the plaintiff. In other words, that the jury, in determining whether the injury resulted from the negligence of the defendant, or the accident could have been avoided by the exercise of ordinary care by the plaintiff, were confined to the *evidence produced by the defendant*.

As was said in the case of *Lewis v. B. & O. R. R. Co.*, 38 Md. 588: "The question in this and in all cases of the like kind is whether the injury complained of was caused *entirely* by the *negligence or improper conduct of the defendant*, or whether the plaintiff so far contributed to the same by his *own negligence or want of ordinary care and prudence*, that, but for such negligence or want of care and prudence, the injury would not have happened. In the first case, the plaintiff would be entitled to recover—in the latter he would not, unless *the defendant*, by the exercise of *care and prudence*,

might have avoided the *consequences* of the *plaintiff's negligence*."

While an injury may be sustained under such circumstances as, when shown, give rise to the presumption of negligence on the part of the defendant, the testimony adduced to show these circumstances, may also disclose such evidence as will justify the Court in saying, or the jury in finding, that the plaintiff was guilty of such contributory negligence as defeats his right of recovery.

Without meaning to say as a matter of law that the testimony produced by the plaintiff shows that he was guilty of contributory negligence, it does contain evidence from which the jury could have found that the plaintiff had the opportunity to go inside the car, and that, instead of doing so, he remained on the platform, and that under the circumstances disclosed by this evidence he was negligent, and that but for such negligence on his part he would not have been injured.

Notwithstanding the jury may have so found, yet under the instructions contained in the plaintiff's first prayer, they were required to find for the plaintiff, unless *the defendant showed* that the injury did not result from its negligence, or that it could have been avoided by the exercise of ordinary care on the part of the plaintiff.

In the case of *Phil., B. & W. R. Co. v. Hand*, 101 Md. 233, this Court, in condemning a prayer which told the jury that they "were not entitled to presume that the plaintiff was guilty of negligence, but that fact, if relied upon by the defendant, must be *proved by the defendant* by preponderating testimony," said: "Contributing negligence will defeat a plaintiff's action. It can, therefore, make no possible difference whether that negligence is proved by the plaintiff or by the defendant. It is its *existence*, and not the *party* by whom its existence is proved, that is material. It is the *thing* itself that defeats the action, and not the mere *accident* that it happens to be proved by the one or the other of the opposite parties. It is just as complete a bar to the action when its pres-

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ence is revealed in the evidence introduced by the plaintiff, as it is when disclosed in the testimony adduced by the defendant. Inasmuch, then, as the negligence of the plaintiff directly contributing to the happening of the injury sustained, bars a recovery, it would seem *a priori* to follow, that it is absolutely of no consequence by which party to the suit that negligence is proved. Consequently it was error to instruct the jury that to be a defense such negligence *must* be proved by the *defendant*."

Appellee's counsel cites and relies upon the case of *N. Balto. Pass. Ry. Co. v. Kaskell*, 78 Md. 517, where a similar prayer was approved by this Court. While plaintiff's first prayer in *Kaskell's Case* does conclude by requiring the defendant to show contributory negligence, etc., the facts of that case are entirely different. There the plaintiff was injured by reason of his having his hand around the window post of the street car. The car on which he was riding left the track and finally came in contact with a box car of the Western Maryland Railroad, mashing plaintiff's hand. Plaintiff's evidence was that the car was crowded, passengers were standing in the aisle, and the car was jolting so that the passengers with difficulty retained their seats, and that he had to take hold of the window under the circumstances to hold himself on; while the defendant's testimony was that, before and at the time of the accident, he had been sitting with his elbow resting on the window sill, with his hand "clasped around the post of the window, the back of his hand being outside the car." Therefore, according to plaintiff's evidence he was forced by reason of the defendant's negligence to take hold of the window, and he was not guilty of contributory negligence, while defendant's evidence tended to show that he was. Under such circumstances plaintiff's evidence showing that he was free from blame, it was necessary for the defendant to show that he was negligent, and the instruction as applied to the record in that case is not at all in conflict with the views we have expressed in regard to plaintiff's prayer in this case.

The defendant asked the Court, by its ninth prayer, to instruct the jury that "where there is ample room inside the car, a passenger who, for his own convenience, stands upon the platform, assumes all the risk of being upon the platform," and that if they found that the plaintiff had a reasonable opportunity to go in the car, but failed to do so, and that he was injured in consequence thereof, their verdict should be for the defendant; and by their tenth prayer, that if they found that he "got upon the car, passed the doorway and took a position upon the platform," * * * "then he assumed the risks incident to such position;" and if they further found that he was injured by reason of his being in such position, their verdict should be for the defendant; and by their eleventh prayer, that the platform of the car is a more dangerous place than the inside of the car, and if they found that the plaintiff was standing on the platform of the car after he had a reasonable opportunity to go inside, and that he was injured because of his position, their verdict should be for the defendant. In other words, these prayers asked the Court to say as a matter of law, that if the plaintiff was on the platform of the car after having had an opportunity to go inside the car, and was injured in consequence of his being there, he was guilty of contributory negligence, and cannot recover.

In the case of *Yorkt'n T. R. v. Cason*, 72 Md. 377, where the plaintiff was riding on the front platform of a street car, contrary to the rules of the company, which he knew, or ought to have known of, and fell from the car and was injured, the Court, after citing the case of *Balto. City Pass. Ry. Co. v. Wilkinson*, 30 Md. 232, as holding "that a regulation forbidding passengers to get on and off any car by the front platform was reasonable, and that knowingly to violate it was conclusive evidence of negligence on the part of the passengers," said: "Had he been inside the car, where he ought to have been, the injury would not have been sustained. His own voluntary choice placed him in an exposed position, and that position rendered the injury possible. It was a posi-

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tion not provided for him to occupy, and even a careless observer must know that it was the most dangerous one to take. He thought proper to make an experiment under circumstances of peril open and known to him, which he could have reasonably avoided, and it is no injustice that he is required to bear the consequences of his own act."

In the case of *State, use of Miller, v. Western Md. R. Co.*, 105 Md. 33, where the party killed was voluntarily riding on the platform of a railroad car at the time of the accident, the Court held the rule to be well settled, "that if a person voluntarily takes an exposed position upon a train, he himself incurs the special risk of that position. In this case the risk was so obviously dangerous that a prudent man would not think of incurring it." * * * "In the case at bar, if the deceased had gone into the passenger or baggage car, and not remained on the bumper or platform, he would not have been killed. He voluntarily selected a place of danger and remained there until he was killed."

In both of these cases the Court held that the conduct of the party injured, as to which the proof was clear, and as to the nature of which there was no room for ordinary minds to differ, amounted in law to contributory negligence. And there are numerous cases elsewhere which hold that a party who rides on the platform of a train or a rapidly moving street car, in the absence of some good excuse for so doing, is guilty of negligence, and among them is the case of *Thane v. Scranton Traction Co.*, 191 Pa. St. 249; 43 *Atl. Rep.* 136, referred to by the appellant, where the Supreme Court of Pennsylvania recognized that the previous decisions of that Court had established the rule that standing on the platform of a moving railroad train was negligence *per se*, but that standing on the platform of an ordinary horse car was not negligence *per se*, but raised a question for the jury, and held that: "The increased speed upon electric passenger railway lines, with its resultant danger, now approximates to that of steam railroads," and that where a passenger, without

any special reason for doing so, remains on the platform of a moving trolley car, he is guilty of negligence *per se*.

The general rule as stated by *Hutchinson on Carriers*, Vol. 3, Sec. 1174 (3rd Ed.), is that: "Where the question whether the negligence of the passenger did, in fact, proximately and naturally contribute to the injury, depends for its determination upon conflicting testimony, it must be submitted to the jury as a question of fact. And although the facts have been ascertained, if they are such that fair-minded men might honestly come to different conclusions as to the injury sustained by the passenger having been contributed to by his own carelessness or imprudence, the question of his contributory negligence must be determined as one of fact by the jury." And from the decisions of this Court it may be said that, "Unless there is some prominent and decisive act, in regard to which there is no room for ordinary minds to differ," and unless the conduct of the plaintiff relied on as amounting in law to contributory negligence, is established by clear and uncontradicted evidence, the case should not be withdrawn from the jury; and that, "when the nature of the act relied on to show contributory negligence can only be determined by all the circumstances attending the transaction, it is within the province of the jury to characterize it." *McMahon Case*, 39 Md. 449; *Lake Roland Co. v. McKewen*, 80 Md. 593; *Cook v. St. Ry. Co.*, 80 Md. 538; *Baker v. Md. Coal Co.*, 84 Md. 19; *Winkelman & Brown Co. v. Colladay*, 88 Md. 91; *Strauss v. United Rys. Co.*, 101 Md. 497. In this case there is not only a conflict of evidence as to the conduct of the plaintiff relied on as constituting contributory negligence, but the nature of the act, so relied on, can only be determined by considering all the circumstances attending the accident, and it was for the jury to say under all the circumstances whether the plaintiff in being on the platform, after he had had an opportunity to go inside the car, was guilty of contributory negligence. According to the evidence, the car was either standing still, or if it had started, it had not "moved perceptibly;" the plaintiff was either in

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the act of entering the car when the accident happened, or had stopped on the platform momentarily, or for the short time mentioned in the evidence, with a view of going inside as soon as the car started, or with the intention of remaining there. Under such circumstances, the Court would not be warranted in saying as a matter of law that he was guilty of contributory negligence, or that in being on the platform, after having had an opportunity to go inside the car, he assumed the risks of the collision which occurred, and these prayers were, therefore, properly refused. In the case of *Strauss v. United Ry. Co.*, *supra*, this Court said: "If the manner in which he (plaintiff) stood be not fixed by clear and uncontradicted evidence, the Court cannot say, as a matter of law, that the appellant was guilty of contributory negligence. Again, what danger then existed, against which, by the exercise of ordinary care he ought to have guarded himself. He should not be required to predicate danger, unless there was something in the situation known to him, or which he could have known by the exercise of reasonable care, from which he was, or ought to have been warned of his peril. Here it seems, he stood up at the time the speed of the car was about to be increased. He should have known that when that happened certain irregularities of motion would be experienced. It cannot be doubted that he was reasonably prudent in taking an upright position as against the usual expected increase of speed. But the only evidence is that the lurch of the car was 'sudden, unexpected and unusual.'"

The doctrine of assumed risks or waiver of right of action, which has most frequent application to the relation of master and servant, while theoretically distinct, in its practical application to ordinary negligence cases between passengers and carriers, not affected by any contractual relation other than the implied contractual obligations between them, necessarily, it would seem, involves the doctrine of contributory negligence. For unless the position voluntarily taken by a passenger exposes him to dangers that are obvious and patent, or such as he knew of, or by the exercise of ordinary care ought

to have anticipated, he cannot in justice, in case of resultant injury, be held guilty of contributory negligence, or to have assumed the risk of an injury he had no reason to anticipate, or to have waived his right of action therefor. On the other hand, if the danger to which he voluntarily exposed himself, was obvious and patent, or such as he knew of, or by the exercise of ordinary care ought to have anticipated and injury follows in consequence thereof, then he was guilty of contributory negligence, and must be held to have assumed the risk of his position. And that is what the learned Judge meant in *Strauss's Case*, which is in entire accord with the views expressed in *Cason's Case* and in *Miller's Case*.

By the defendant's sixth prayer the Court was asked to instruct the jury, that if the plaintiff took an exposed and dangerous position on the car, and he was injured by reason of his taking such position, he could not recover. This prayer entirely ignores plaintiff's own testimony that he got on the platform and took such position as he was about to enter the car, and before he could get inside the accident happened, and was therefore properly refused.

We find no errors in the rulings of the Court on the other prayers, or defendant's special exceptions to plaintiff's prayers, the exceptions to which were not pressed in this Court. The evidence excepted to in the first and second exceptions, was the testimony of the plaintiff that before the accident he had an arrangement to go into business, had intended to go into business. This evidence was doubtless offered for the purpose of enhancing the damages, by showing that before the accident he had good business prospects, which he lost in consequence thereof, and was clearly inadmissible. In the recent case of *Winslow Elevator and Mach. Co. v. Hoffman*, 107 Md. 621, JUDGE BURKE, in quoting from 13 *Cyc.*, 59, states the rule to be that "when a new business or enterprise is floated, and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an

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established business, and its profits are speculative and remote, existing only in anticipation."

The evidence that the plaintiff had married after the accident, excepted to in the third exception, is evidence of the same character as the evidence held to be inadmissible in *Stockton v. Frey*, 4 Gill, page 420, and *Pensylvania Co. v. Roy*, 102 U. S. 451, and there was error in permitting it to be given, but we must not be understood as saying that it was such an error as would justify this Court in reversing the judgment on that ground alone, the jury having been properly instructed as to the measure of damages. *B. & O. R. R. Co. v. Shipley*, 31 Md. 368; *B. & O. R. R. Co. v. Hauer*, 60 Md. 459. For the errors in the ruling of the Court in the first, second and third bills of exception, and in granting plaintiff's first prayer, the judgment must be reversed, and the case be remanded for a new trial.

Judgment reversed with costs, and case remanded for a new trial.

JOSEPH WILLNER vs. HARRIS SILVERMAN, ET AL.

Blacklisting of Employee—Interference with Another's Business—False Statement Concerning Discharged Workman—Actionable Wrong—Evidence—Letter Written by Unauthorized Employee of Firm.

One who requests other persons not to give employment to plaintiff, a workman he had discharged, and in doing so makes untrue statements concerning the plaintiff and expresses a desire to make an example of him, is liable in an action for the injury shown to have been thereby caused to plaintiff.

When defendant wrote a letter notifying the members of an association, consisting of persons in the same trade, that he had discharged the plaintiff from his service and requested them not to give him employment, and the plaintiff is subsequently refused employment by the members of the association, that is evidence that this refusal resulted from the writing of the letter.

In an action against three persons, individually and as a firm, alleging that they had injured the plaintiff by sending a letter containing false statements concerning him and requesting the members of a trade association to which defendants belonged not to employ plaintiff, the evidence showed that the letter was written by M., one of the defendants, without the knowledge of the others; that M. was an employee not authorized to write such letters; that the writing of this letter was not previously authorized or subsequently ratified by the other defendants, and that the firm was not formed until after the injury complained of. *Held*, that the plaintiff's right of action is against M. only.

When all of the facts in regard to the sending out of a letter have been proved, a witness cannot be asked for his opinion as to circumstances attending the issue of the letter.

In an action to recover damages for having been unjustifiably blacklisted, which prevented him from obtaining employment, the plaintiff cannot be asked: "What reason, if any, was given by the various people to whom you applied, for their refusal to employ you."

When one, after talking over the telephone with a person at a distance, repeats what that person said to the witness, then present with him during the conversation, the witness cannot testify as to what was so repeated to him, since it is hearsay.

Decided January 12th, 1909.

Appeal from the Superior Court of Baltimore City (ELLIOTT, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and HENRY, JJ.

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Argument of Counsel.

John Prentiss Poe and *Thomas Mackenzie*, for the appellant.

The fifth exception arises upon the refusal of the Court to allow the plaintiff to testify as to the reasons for not employing him given by the various persons to whom he applied for work. Here was a laboring man endeavoring to procure employment after he had been summarily discharged by his last employer, and he learns while searching for work and meeting with rebuffs that he had been *blacklisted*, and that all the members of the Clothiers' Board of Trade are banded together not to employ any workman discharged by any of its members.

The defendant, Harris Silverman, on the stand had denied all knowledge of the letter, and it was the plaintiff's privilege to contradict that statement. The reasons given were parts of the *res gestæ* and admissible as such. It is to be observed that on cross-examination of the plaintiff he testified that Brown refused to employ him, as he had agreed to do, as soon as he (Brown) learned that he had been blacklisted.

The sixth exception was to the refusal of the Court to allow the witness, the plaintiff, to testify as to conversations over the 'phone had by Lauchheimer in his presence with the defendants at the time the plaintiff applied for work. A conversation by telephone, though the parties had to transmit their message through a third party, is *not inadmissible*. *Oskemp v. Gadsden*, 35 Neb. 7; 17 L. R. A. 440. The report of a telephone operator to a person for whom he is talking as to what is said by the other party whom he has been requested to call up, was held to be properly proved by the party for whom he was talking. *Sullivan v. Kuykendall*, 82 Ky. 483.

The evidence in the case was sufficient to go to the jury from which they could have found that the defendant, Harris Silverman, knew of the writing of the letter in the first instance, and had conspired with his son Moses to injure the plaintiff by the circulation of false and untrue statements, which statements, proven to be false, brought about the injury of which the plaintiff complains.

"The gravamen in a civil action is not the conspiracy, *but the malice*, the former is matter of aggravation, or inducement only in the pleading and evidence under which one or all of the defendants may be found guilty." *Van Horn v. Van Horn*, 10 L. R. A. 184. To the same effect are—*Kimball v. Harman*, 34 Md. 407; *Robertson v. Parks*, 76 Md. 118; *Brinkley v. Platt*, 40 Md.

All who aid, command, advise or countenance the commission of a tort by another, or who approve of it after it is done, without reference to comparative individual interest, are liable, if done for their benefit, in the same manner as if they had done the tort with their own hands. *Hilliard on Torts*, sec. 9.

There can be no such thing as a conspiracy to do a lawful thing unless by *unlawful* means. If one railroad company may lawfully refuse to continue in its employ a person who has been engaged in a war upon its interests, called a strike, or who has shown himself to be negligent, incompetent, inefficient or dishonest, there does not appear to be any good reason why a number of railroad companies might not agree among themselves not to employ such a person. * * * If the defendant by fraud, falsehood or force had brought about a refusal to employ the plaintiff, it would have committed a positive wrong against the plaintiff which would have been actionable. *N. Y. & S. R. R. v. Schaffer*, 65 Ohio St. 414; 62 L. R. A. 931.

The agreement of the defendant, Harris Silverman, with the other members of the Clothiers' Board of Trade was in itself in the nature of a conspiracy, at least it was an agreement having for its object the united refusal of employment to any discharged employee of its members, unless that employment was sanctioned by the discharging employer. It was the union of the manufacturers as against the union of labor. It has been repeatedly decided that in the absence of statutory restrictions the employers have the same right to combine as the employees. Yet no Court has ever sanctioned either the employers or employees in using the union for a

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wrongful purpose. In every instance where an injury to another has been attempted under the form of organized effort the Courts have not hesitated to denounce such action as contrary to law as well as to the peace of society and to the rights of the individual. And in some of the States statutes have been passed making it a penal offense for any corporation, firm or individual to *blacklist* an employee with the intent of preventing him from obtaining employment. We cite the following: Colorado—1 *Mills Anno. Stat.*, Ch. 15, page 487; Georgia—*Code* 1895, Sec. 1875; Indiana—*Horner's Anno. Stat.* 1901, Sec. 5206, page 5206, q. 2; Iowa—*Code* 1897, Secs. 5027-8; Kansas—*Gen. Stat.* (Dassler), 1901, *Laws* 1907, Secs. 2221, 2223; Minnesota—*Laws* 1895, Ch. 174, 14 a; Missouri—*Rev. Stat.* 1899, Sec. 2166; Montana—*Political Code* 1895, Sec. 3390, 3391; *Penal Code* 1895, Sec. 656; N. Dakota—*Rev. Code* 1899, Sec. 7042; Oklahoma—*Laws* 1897, page 144; Virginia—*Hurst's Code*, 1898, Sec. 3845 b (*Acts* 1891, 1892, page 976); Wisconsin—*Rev. Stat.* 1898, Sec. 4466 b; see note to *Wabash Ry. v. Young*, 162 Ind. 102, 4 L. R. A. N. S., page 1118.

Under the common law, any agreement, confederation or conspiracy to do anything with the intent to injure another is an indictable wrong, and our own State has very clearly laid down the common law rule in *State v. Buchanan*, 5 H. & J. 356. And the liberty to employers to combine would not be permitted if the purpose was to carry out a scheme of wrongful injury to another through such combination.

Had Harris Silverman and his son deliberately agreed with the Clothiers' Board of Trade to specially injure the plaintiff there would be no question that it was a criminal conspiracy, and yet that in effect is what they accomplished.

Harris Silverman is a member of the Clothiers' Board of Trade, the very object of which union is to prevent the employment of *any* discharged employee, no matter who he may be. The son writes the letter which sets in motion the Clothiers' Board of Trade, and its actuary, following out the usual course in such matters, transmits to each member a letter

which asks that they unite with Harris Silverman & Sons in "making an example" of the plaintiff, and as a result of it the plaintiff is refused employment by many of the members of the said Board of Trade.

It is true the plaintiff was a member of a labor organization, but there was nothing wrong in that. On the contrary, the Supreme Court of the United States has said in *Adair v. U. S.*, 206 U. S. 282: "Labor organizations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage-earners, an object entirely legitimate, and to be commended rather than condemned."

In *Hundley v. L. & N. R. R.*, 105 Ky. 162, 63 L. R. A. 289, the plaintiff had been discharged by a railroad with which he had been employed. The railroad employer with others was in combination not to employ discharged employees of the other roads. The action was in "tort for the injury done plaintiff by falsely charging him with neglect of duty, thus placing him on a *blacklist*." The Court held: "That such false entry must be regarded as *intended* to injure the discharged employee; therefore a malicious act." "Injury is the gist of the action. The liability is damages for *doing*, not for *conspiracy*."

Conceding that the word *blacklist* has no well-defined meaning in the law, either by statute or judicial expression, the general understanding of the term is that it has reference to the practice of one employer presenting to another the names of employees for the purpose of furnishing information concerning their standing as employees. *Schaffer v. Justus*, 85 Minn. 279, 56 L. R. A. 757.

In *Blumental v. Shaw*, 23 C. C. A. 590, an (apprentice) employee was discharged, notices sent out saying he had *left without cause*; action for damages sustained.

And so in *Willis v. Muscogee Mfg. Co.*, 120 Ga. 597, an employer who *wrongfully* reports an employee and thus damages him by preventing his getting work, is liable. The Court took the position that an employer has a right to select the

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Argument of Counsel.

employees, and an agreement among employers was lawful. "While the corporation which entered into the agreement had a right to do so, they owed a duty to their employees not to abuse that right. If one of them *falsely* reported an employee, to his injury, such employee may recover for the tort. The combination of the employers was a powerful machine for the accomplishment of lawful results, but it was capable of misuse to the injury of innocent employees. When a company so misuses it, such company must take the consequences."

The *intent* or knowledge with which an act is done may make a lawful act unlawful. Whilst an act which is in itself lawful can never become unlawful simply because it may be done by several persons instead of only one, yet the same act may be unlawful when it is a *means* of accomplishing an *unlawfully end*. *Klingel's Phar. v. Sharp*, 104 Md. 233.

The basic contentions of the case at bar bear a close analogy to the case of *Mattison v. Lake Shore* (2 Ohio N. R. 276), where it was held that the employees' right to employment is equally sacred with the right of the employer to employ him; that an employer is to judge for himself whom he will have to work for him, and it makes no difference whether he refuses to let a man work for him because he is incompetent, or because he dislikes him; he has a right to seek his employees, but his right to discharge ends with his own employment, and he must not touch upon the right of the employee to seek other employment. This was said in overruling a demurrer to a petition, which alleged among other things, that the defendant, a railroad company, after discharging the plaintiff, had conspired, confederated and connived together with a great many other railroads already acting in concert, to defraud and injure plaintiff and prevent him from securing employment in his avocation as a railroad man, and had wrongfully, maliciously and unlawfully caused certain *black-list* rules to be enforced against the plaintiff, thus preventing him from getting employment. In so deciding, the Court said: "So long as the company simply discharged the plain-

tiff, their right to make the discharge should not be questioned, but if they made *combination*, as was charged in the petition, with the other companies, that they should not employ him, they went beyond their *legal* right. See note 62, L. R. A., pages 717, 718; *Klingel's Pharmacy*, 104 Md. 224.

In the present case we find a letter sent out over the name of Harris Silverman & Sons, which was admitted to have been dictated, signed and mailed by the defendant, Moses Silverman, on the very day, and in fact immediately after the discharge of the plaintiff. This letter charges the plaintiff with being a disorganizer and a source of trouble (it will be remembered that Harris Silverman had already accused the plaintiff of the same offense), and it was written with the avowed purpose of "making an example of the plaintiff" and keeping him from procuring employment among the clothing manufacturers of Baltimore city who were members of the Clothiers' Board of Trade. The essential statements contained in this letter were as a matter of fact wholly false and malicious, proved to be such by the uncontradicted testimony of the plaintiff, which testimony the defendants in no particular endeavored to assail. The evidence further shows that this false and malicious letter accomplished its intended result, the blacklisting of the plaintiff, whereby he was unable to obtain work among the members of the Clothiers' Board of Trade until he had consulted counsel and instituted suit. Then, and then only, was he given work, but it is to be noted at a reduced wage. Here then we have an actual money damage, which, taken together with the value of time lost while seeking work, amounts to \$96, a loss suffered by the plaintiff solely by reason of the unlawful action of the defendants in circulating a false and malicious letter.

In addition to this the plaintiff's reputation as a reliable and safe workman was injured, for he was branded as a source of trouble and a disorganizer, and it was clearly for the jury to determine how far such a charge destroyed the plaintiff's ability to procure remunerative labor.

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The defendants were not in the position of a master giving to another a reputation of his former servant, and entitled to claim the privilege of such communication.

While communications by masters touching the character of servants are privileged, at the same time, wherever it appears the pretended privileged communication was merely a cloak for the indulgence of malice and personal ill-will, resentment or spite, it ceases to be any protection against civil responsibility, and in many instances by reason of its covert and insidious, if not cowardly character, will rather be regarded as a circumstance of aggravation.

The defendants may claim that they were within their rights in advising their fellow members in the Clothiers' Board of Trade not to employ plaintiff, and had they stopped at that point, there might be some weight to their contention. But they went further than any good to themselves or their fellow members could justly warrant, and the case at bar is not such a one in which the defendants can shield themselves behind such a defense. There was no duty, either moral or legal, resting upon the defendants in the matter. The information sent out by them, *if true*, had not been given in response to an enquiry of anyone about to employ the plaintiff. It was information *voluntarily* given, and had all the accompaniments of *express malice* which gave the plaintiff the right to recover such damages as he established. *Fresh v. Cutter*, 73 Md. 87.

They had deliberately started to wreak their vengeance on plaintiff for his supposed wrong, and to "*make an example of him*" that all the world might see him branded as a *disorganizer* and unfit to be employed. No possible good to the defendants or their fellow members in the Clothiers' Board of Trade could under any circumstances come to them from such a charge, while every species of wrong to his rights must necessarily flow from such an injury.

William S. Bryan, Jr., and Sylvan Hayes Lauchheimer, for the appellees.

No testimony was offered that any partnership existed among the defendants at the time the letter was written, or that the defendant, Moses Silverman, had any authority to write the letter. Even if the plaintiff had shown the existence of a partnership on the day on which the letter was written, under the authorities, the writing of this letter by one partner, without the prior knowledge or consent of, or the subsequent ratification by, the other partners, could not have bound the other partners thereto, and no liability in an action of tort would attach to the other partners, because of the action of one partner in writing such a letter. This is well established by recent decisions of this Court. *Kirk v. Garret*, 84 Md. 383; *Bernheimer v. Becker*, 102 Md. 250.

The fact that a letter was written and that for two weeks the appellant failed to receive employment means nothing. He may not have received employment for any number of reasons, viz: There may have been no vacancy, or any number of other considerations might have controlled the employers in not engaging the appellant, and until it appears from the testimony that the employers refused to engage the appellant because of some action of Moses Silverman or the other appellees it would be the sheerest kind of speculation to say that because a letter was written and Wilner did not secure employment for two weeks, the latter was the effect and the former the cause. Indeed, this Court has declared that the mere happening of one event does not justify an inference that it was caused by another, but that there must be a concurrence of event and cause and the nexus between them must be shown to exist to constitute a cause of action. *Benedick v. Potts*, 88 Md. 52; *B. & O. R. R. Co. v. State, use of Black*, 108 Md.

The mere sending of a letter is not sufficient. A connection between the sending of the letter and the discharge must be shown. *Wabash Railway Company v. Young*, 4 L. R. A. (n. s.) 1091.

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Argument of Counsel.

The appellant failed to show that any damage was sustained by him because of any action of the appellees. He placed but one employer on the stand, and that employer stated that he was not influenced by any rule of the Clothiers' Board of Trade (no rule, however, was proven to exist), and that he did not think that when Wilner applied to him for a position he had a vacancy. Beyond this there is nothing to show why Wilner failed to secure employment from the half a dozen houses from whom he solicited employment (although there were over one hundred employers of cutters in Baltimore), and until this be shown, no matter how wrongful the act of the appellee Silverman might have been, no right of action exists because one of the essential elements necessary to constitute a right of action would not be present.

The appellee, Harris Silverman, had the right to discharge the appellant at any time, with or without cause, no matter how malicious, capricious or arbitrary his action might have been. "It is a part of every man's legal rights," said JUDGE COOLEY, "that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice." *Klingel's Pharmacy v. Sharp & Dohme*, 104 Md. 218; *My Maryland Lodge v. Adt*, 100 Md. 249; *Adair v. United States*, 208 U. S. 175; *Henry v. R. R. Co.*, 139 Pa. St. 291; *Boyer v. Western Union Telegraph Co.*, 124 Fed. Rep. 248; 2 *Cooley on Torts*, 3rd Ed., page 591.

The writing of the letter to the Actuary of the Clothiers' Board of Trade did not violate any right of the appellant. An inspection of that letter will show that it was merely a request to the other members of the Clothiers' Board of Trade not to employ Wilner, a request which might have been disregarded by any of them, and which was in fact disregarded when Wilner was employed by one of the members and put to work on January 7, 1907.

This Court has recently said that a party may use persuasion to accomplish his end, but may not use force, violence, intimidation or perjury. *My Maryland Lodge v. Adt*, 100

Md. 238, 250; *Klingel's Pharmacy v. Sharp & Dohme*, 104 Md. 218.

This letter was merely an attempt to use persuasion to induce the members of the Clothiers' Board of Trade to refrain from employing Wilner; the appellee had no power to coerce them and did not threaten them in any wise if they did employ him. He did what this Court has said he had the right to do, and although as a matter of fact, as has been shown before, no damage resulted to the appellant because of the writing of this letter, even if it had, the letter being an attempt at persuasion, did not violate any right which the appellant had and which the appellee Silverman was bound to regard (the appellee Silverman being employed by his father, Harris Silverman, and thinking that he was doing an act for the benefit of his employer). *My Maryland Lodge v. Adt*, 100 Md. 249; *Klingel's Pharmacy v. Sharp & Dohme*, 104 Md. 232; *Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.*, 54 Minn. 223; 21 *L. R. A.* 337; *Bradley v. Pierson*, 148 Pa. St., 502, 503.

The letter written by the appellee, Moses Silverman, to the Actuary of the Clothiers' Board of Trade contained the statement that Wilner had been a source of trouble and had been trying to disorganize the rule of the appellee, Harris Silverman. The testimony of Wilner himself shows this to be true, inasmuch as he admits that he endeavored to make one of the employes of the appellee discontented after he had accepted employment at a wage of which Wilner did not seem to approve. This in itself shows the truth of the statements made in the letter, but whether a man is a disorganizer and whether the use of that term is an epithet of opprobrium, is after all only a matter of opinion, about which people might well differ. Some men might think it their duty to be disorganizers, as did George Washington, Charles Stewart Parnell, and other leaders. But even though this was not so, it has been held that calling a person a "labor agitator," which is even stronger than a "disorganizer," is not libelous. *Wabash Railway Co. v. Young*, 4 *L. R. A.* (n. s.) 1091, 1097, 1098.

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HENRY, J., delivered the opinion of the Court.

This is an action on the case brought by the appellant, the plaintiff below, against the appellees, the defendants below, grounded on a declaration containing four counts, the first three of which allege in substance that the defendants, after discharging the plaintiff from their employment, maliciously conspired or contrived to injure him by blacklisting him and writing a letter, containing false statements, to the members of an association, known as The Clothiers' Board of Trade of Baltimore City and requesting such Association members to refuse employment to the plaintiff, while the fourth count sets out at length the details of the grievance complained of, omitting the charge of conspiracy.

The defendants filed the general issue plea, and the verdict, under the instruction of the Court, being for the defendants, the plaintiff entered an appeal to this Court.

The appellant was a cutter of cloth in the establishment of Harris Silverman, one of the appellees, in Baltimore City, and on December 19, 1905, was discharged, his employer sending for him on the afternoon of that day to come to his office, and saying to him: "Willner, you are a disorganizer and an agitator, I cannot use you any longer; here is your envelope," which contained wages up to date.

When Willner asked why he said that, Mr. Silverman replied: "Because you told a man, who has worked for me before and who left me and started in again, I hired him yesterday—you told him to ask for more money." Willner said: "Mr. Silverman, I did not tell him to ask for more money, I merely said to him, 'Cosman, is that true what a fellow tell me that you started in again for \$2.75.' He said: 'yes;' I said: 'Charlie, I am surprised at you.'"

It seems that the man, Cosman, who had been hired the preceding day, in consequence of this conversation with the appellant, demanded an increase of wages to \$3.00 per day, which was granted.

On the day of the discharge, Moses Silverman, son of Harris Silverman, and one of his employees, wrote the fol-

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lowing letter to the Clothiers' Board of Trade, an organization comprising in its membership about twenty clothing dealers of Baltimore, including Harris Silverman, one of the appellees, it being one of the rules of said association that an employee discharged by one member should be refused employment by all other members.

"BALTIMORE, December 19, 1906.

MR. SYLVAN HAYES LAUCHHEIMER,
Local.

DEAR SIR:—

We desire to call your attention to Mr. Jos. Willner, a cutter who was formerly in my employ. We would request you to see that he is refused employment in all Association houses in which he may apply for a position. He was the shop chairman of my cutting room, and in addition to this, he has been a source of trouble. In other words, he has been trying to disorganize my rule. We took on a cutter yesterday at a certain price, and when he went to work this morning, he told him to insist on more money, otherwise we suppose they would have made it unpleasant for him. He came down and stated his demand, to which we acceded, but thought we would be better off by discharging Mr. Willner, who was the cause of the disturbance. We think it no more than right that the Association should back us up in this matter, and refuse this man employment, as we would like to make an example of him.

Yours truly,

M. S.

(Signed) HARRIS SILVERMAN & SONS."

Evidence was offered tending to prove that this letter was duly received by the Clothiers' Board of Trade, and that copies of the same were made by the clerk, according to routine, and promptly delivered to the various members of the Association.

Willner, on the morning after his discharge started out to secure other employment, and continued his efforts, without success, until January 4th, following, when he was employed by M. Lauchheimer & Sons, one of the members of the

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Clothiers' Board of Trade. In his search for work, the plaintiff made application to eight different clothing firms in Baltimore, six of them being members of the aforesaid Association.

At the conclusion of the plaintiff's testimony, the defendants offered two prayers, the first asking the Court to instruct the jury that there was no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendants, and the second asking for an instruction that there was no evidence legally sufficient to entitle the plaintiff to recover against Harris Silverman and Louis Silverman.

Both of these prayers were granted, to which action the plaintiff excepted, and these exceptions constituting the 11th and 12th bills will be first discussed.

Preliminary thereto, it may be well to announce as a principle of law that any malicious interference with the business or occupation of another, if followed by damage, is an actionable wrong. Such interference may be by a single individual, or by a number of individuals conspiring together, but it is the damage which constitutes the gist of the action, and not the conspiracy, the latter being a matter of aggravation, if proven, as affecting the means and manner of redress. We find no Maryland case that goes to the extent of sustaining the position contended for by the appellant to the effect that the "blacklisting" of discharged employees by a combination of employers is in itself actionable, without proof of damage. In the case of *Walker v. Cronin*, 107 Mass. 562, it is stated that to maintain an action of this character it is necessary for the plaintiff to prove—"(1) intentional and wilful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting."

An employer, where no right of contract is involved, may lawfully discharge an employee at what time he pleases and

for what cause he chooses, while, on the other hand, an employee may sell his labor to whomsoever he desired at such wages as he is willing to accept and may quit such employment at his pleasure, yet neither has the right to interfere, without cause, with the business or occupation of the other.

While the law does not furnish a shield against the effects of fair and honest competition, yet injury to the business of another, if accomplished by threats or coercion, constitutes a ground of action for damages on the part of the person so injured.

In furtherance of their common welfare and in settlement of their oftentimes conflicting interests, both employers and employees stand upon a plane of perfect equality before the law, enjoying the same freedom and amenable to the same restrictions. Both may combine in unions or associations, but such associations, like individuals, must employ lawful methods for the attainment of lawful purposes.

This was not always so, as appears from the account of the progress of trade unions, as given in the 2nd volume of McCarthy's "History of Our Own Times," referred to by the appellant's brief. Looking at the subject in retrospect it is difficult to understand how the conditions and sentiments therein described could obtain lodgment in public opinion or receive sanction in the Courts, for it is now clearly settled that the same law which permits the organization of employers and interposes to protect manufacturers or merchants from the violence of "strikes," or the "intimidation of boycotts," is also vigilant to see that the right and opportunity to work, which is the most valuable asset of the laboring man, as well as the privilege of organization, shall not be unjustifiably interfered with by employers, acting either as individuals or in combinations. *Barnes v. Typographical Union*, 232 Ill. 424; *Walker v. Cronin*, 107 Mass. 562; *Kimball v. Harman*, 34 Md. 407; *Robertson v. Parks*, 76 Md. 135; *Klingell's Pharmacy v. Sharpe & Dohme*, 104 Md. 231; 8 Cyc., 650.

About the first element for recovery in the plaintiff's case,

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we have no difficulty. While the letter of December 19th aforesaid, is not couched in extravagant language, yet it does not state the facts of the case with entire accuracy, and the concluding sentence of the letter is some evidence of malice on the part of the writer, and the circulation of such letter through the instrumentality of the Clothiers' Board of Trade was an actionable wrong, provided damage resulted therefrom.

On this latter point, we think that the receipt of the letter of December 19th, by the members of the Clothiers' Board of Trade, a body of men engaged in a like business and associated together partly, if not primarily, for the purpose of disciplining employees, are facts affording some evidence from which the jury might infer that the refusal of employment to the plaintiff was because of the rule of the association and the request for its enforcement by the defendants.

Furthermore it is in evidence that one Brown, not a member of the Clothiers' Board of Trade, refused the plaintiff employment after hearing that the applicant had been black-listed. Although this information was communicated to Brown by the plaintiff himself, under circumstances which at least leaves it doubtful as to whether he was actuated by a high moral sense or by a collusive purpose, with Brown, who was his personal friend, to aid in the prosecution of a contemplated law suit against these defendants, yet it was evidence of injury, the weight of which it was for the jury to decide.

The question next arises, who of the appellees is responsible for the wrong alleged in the narr. The uncontradicted testimony shows that the firm of Harris Silverman & Sons was not in existence at the time the above-quoted letter was written, nor was there any evidence whatever to show that Louis Silverman had any connection with the case. Therefore as to the firm of Harris Silverman & Sons, which did not come into existence until January 1st, 1906, and as to Louis Silverman, individually, it is clear that there was no right of action.

Concerning Harris Silverman, there is no evidence legally sufficient to show that he either authorized or subsequently ratified the action of his son in writing the letter. The only circumstance from which it could be inferred that he had knowledge of the letter and took no steps to repudiate it, is that, being a member of the Clothiers' Board of Trade, a copy was delivered to him along with the other members, but this is opposed by the equally logical inference that the clerk might not have deemed it necessary to deliver to Silverman what was practically a copy of his own letter. Harris Silverman was a witness for the plaintiff, and in reply to a question as to whether he wrote the letter said: "Positively not; I have no knowledge of it; don't know a thing about it, sir." This is a broad answer, but even if held to be merely responsive to the question concerning the writing of the letter, it was easy for the plaintiff to have followed the question up by a direct question as to when, if ever, the letter came to his knowledge. This the plaintiff failed to do, and we think has left the testimony in too vague and indefinite a shape to provide a basis for the jury to infer a subsequent notice and ratification of the letter by Harris Silverman. Nor is there any ground for holding the father responsible on the ground of the agency of the son, Moses Silverman. The latter testified that he was an employee, who occasionally wrote letters of minor importance, but not on subjects of serious business. The letter in question was clearly not about a routine matter, but was outside of the usual course of business, about which, according to the only testimony in the case, the son would have no authority to take any steps whatever. Holding these views, we think the second prayer of the defendants was properly granted by the Court.

Moses Silverman admits writing the letter in question, and, under the fourth count of the narr., but not under the other counts, the plaintiff has a right of action against him. The first prayer of the defendants was, therefore, improperly granted, and the judgment on that account should be reversed and the cause remanded for a new trial.

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There remain some minor matters to be considered. The seventh exception was waived by the appellant, and the third, fourth, eighth, ninth and tenth exceptions, relating to the refusal of the Court to admit in evidence a copy of the letter of December 19th (which letter was subsequently admitted at a later stage of the proceedings), it was conceded, were not vital and it is not necessary to discuss them.

This leaves open for consideration the first, second, fifth and sixth exceptions. The first exception relates to the refusal of the Court to permit the plaintiff to ask Mr. Lauchheimer, the actuary of the Clothiers' Board of Trade, the following question:

"I will ask you now to tell candidly to the jury whether you have any doubt that letter (referring to the Lauchheimer letter) was issued out of your office over your signature, over your typewritten signature?"

The witness had already stated that he had no knowledge of the said letter having been issued from his office, and had testified as to what was the routine of the office in such matters, and we do not think that the circumstances called for an expression of opinion from him. The facts in connection with the letter and of the witness' knowledge of it were already in evidence and it was for the jury to say from these facts whether or not the letter was issued, and, if so, by what authority.

The second exception was to the propriety of a question as to whether the Directors of the Clothiers' Board of Trade directed the transmission of copies of the Silverman letter to the members of the Association. The ruling of the Court in admitting the question was harmless, if erroneous, and therefore not necessary to be considered.

While on the stand, in his own behalf, the plaintiff was asked this question: "What reason, if any, was given by the various people to whom you applied for their refusal to employ you?" An objection to this question was sustained by the Court, and this action constitutes the plaintiff's fifth bill of exception. In this ruling, we think that the lower

Court was correct. An answer to the question would have fallen within the limits of hearsay evidence. Neither the parties applied to, nor the Association of which a majority of them were members, were parties to the suit, and their replies would not have been admissible against the defendants. The parties themselves should have been called to the stand to testify on this point.

The sixth exception was to the refusal of the Court to allow plaintiff to testify to a telephone conversation between Silverman and Lauchheimer, the plaintiff being in the latter's office while the conversation was in progress and claiming that it was repeated to him at the close. The authority cited by the appellant does not sustain the position taken by him. In the case cited, 82 Ky. 483, the operator of the telephone had been expressly directed by one of the parties to call up a person at a distant point and to converse with such person, asking the questions and repeating the replies as they were given to him, and the Court held that the operator was the agent of both parties, and that in a subsequent suit between the parties the one who had requested the operator to talk for him could testify to what was repeated to him at the time by such operator. There is no such circumstance in the present case, and it would have been clearly hearsay to have permitted the plaintiff to tell the conversation. 16 Cyc. 1196 and Note.

Although, in our opinion, the evidence, as set forth in the record, is legally insufficient to entitle the plaintiff to recover as against Harris Silverman and Louis Silverman individually, or against the firm of Harris Silverman & Sons, yet, as the judgment is an entirety which cannot be affirmed as to some and reversed as to other defendants, we must, for error in granting the defendant's first prayer, simply reverse the judgment and remand the case for a new trial. *East Baltimore Lumber Co. v. The K'Nesset Israel Aushe S'Phard Congregation et al.*, 100 Md. 689, and cases therein cited.

Judgment reversed with costs to the appellant, and cause remanded for new trial.

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Syllabus.

THE BALTIMORE REFRIGERATING AND HEATING COMPANY *vs.* THOMAS KREINER.

Action for Damage to Poultry in Cold Storage Cellar—Evidence—Opinion of Expert as to Construction of Cold Storage Warehouse and Appliances—Burden of Proof as to Negligence of Warehouseman—Instructions.

In an action against a warehouseman to recover damages for alleged negligence in the custody of poultry stored for plaintiff in defendant's refrigerator cellar, evidence is not admissible to show that other poultry stored by defendant for plaintiff on previous occasions had kept for some months in a good condition; but since such evidence works no injury to the defendant its admission is not reversible error.

When the question is whether a cellar in defendant's cold storage warehouse, and the ice-box in which plaintiff's poultry had been put, were properly constructed or not, a witness who was in charge of the cold storage department of another company, and had so been for eight years, who had been in the cold storage business for upwards of twenty years, and who had inspected cold storage plants in several cities, is qualified to testify as an expert as to what is the proper and usual construction of ice boxes, etc.

When goods entrusted to a warehouseman for safekeeping are returned in a damaged condition, the burden of proving that the damage was caused by the bailee's negligence is upon the bailor in an action by him; and it is not to be presumed as matter of law from the fact of damage. But it is not necessary for the bailor to show specific acts of negligence causing the damage. It is for the jury to determine from all the facts of the case whether negligence should be inferred, when such facts are legally sufficient to justify the inference.

In an action to recover damages for injury caused to dressed poultry stored in defendant's cold storage warehouse, the question of defendant's negligence should be submitted to the jury

when there is evidence to the effect that the defendant's cellar and ice box were not properly constructed; that the ice box was not water-tight, as well as air-tight; that there was a crevice under the door which allowed water from a broken main to run into the freezer, and that there was no drain pipe leading from the cellar to carry off water.

The defendant offered evidence to show that the damage to plaintiff's poultry, stored in defendant's cellar, was caused by the bursting of a city water main which flooded the cellar; that such an occurrence had not happened before for sixteen years, and defendant contended that it was not bound to provide against such an accident. The plaintiff proved that defendant's cellar was not properly constructed, and that if it had been, the bursting of the main would not have caused the injury. *Held*, that under these circumstances, defendant is not entitled to have the jury instructed that if they find that the poultry was delivered to plaintiff in damaged condition, and that such condition was caused by the bursting of a city water main, the burden is on the plaintiff to show that there was negligence on the part of the defendant which caused the damage.

Decided January 12th, 1909.

Appeal from the Baltimore City Court (NILES, J.).

Plaintiff's 1st Prayer.—If the jury find that the squabs, ducks and chickens mentioned in the evidence were in good and marketable condition and properly prepared and packed for cold storage when they were deposited by the plaintiff and accepted by the defendant for cold storage during the months of July and August, 1904 (if the jury find such deposit and acceptance), and that the same squabs, ducks and chickens were in a damaged condition when they were delivered by the defendant to the plaintiff during the months of January and February, 1905 (if the jury find they were so delivered); and if they further find that the damaged condition of said poultry was due to the negligence of the defendant; that is, to the failure of the defendant, or its agents or employees,

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to exercise that degree of care and skill or to employ those means and facilities which ordinarily prudent business men in the same business and under the same circumstances would have exercised and employed in the storage and preservation of like goods so deposited, then their verdict will be for the plaintiff. (*Granted.*)

Plaintiff's 2nd Prayer.—If the jury believe that the poultry mentioned in the evidence was in good and marketable condition and properly prepared and packed for cold storage, when it was delivered by the plaintiff to the defendant during the months of July and August, 1904 (if the jury find such delivery), and that the same poultry was in a decayed and damaged condition when it was withdrawn by the plaintiff from the defendant's warehouse, during the months of January and February, 1905 (if the jury find it was so withdrawn), and that there is nothing in the nature of poultry such as the plaintiff's to cause it to become decayed and damaged from being left in cold storage for the time the plaintiff's poultry was; and if the jury further find that during the interval between the delivery of said poultry to the defendant's warehouse and its withdrawal therefrom said poultry was in the exclusive possession of the defendant, then the law presumes that the damage to said poultry was caused by the negligence of the defendant, and the verdict of the jury will be for the plaintiff, unless the defendant shows to the satisfaction of the jury that its negligence (if the jury find that it was negligent) did not cause the damage to said poultry. (*Granted.*)

Plaintiff's 3rd Prayer.—The plaintiff prays the Court to instruct the jury that even though they find that the cellar of the cold storage warehouse of the Baltimore Refrigerating and Heating Company was, without any carelessness or negligence on the part of said company, flooded on December 28, 1904, by the bursting of a city water main one square and a half away from said cellar, and that the damage to the plaintiff's poultry (if the jury find that it was damaged) was caused by such flooding of the cellar, the plaintiff

is still entitled to recover in this case; provided, the jury further find that the said cellar was not a reasonably proper and safe place for the cold storage of the plaintiff's poultry; that is to say, that an ordinarily prudent business man in the same business and under the same circumstances, would not have stored similar poultry in said cellar. (*Granted.*)

Plaintiff's 4th Prayer.—The plaintiff prays the Court to instruct the jury that, although they may find that the cellar of the defendant company's cold storage warehouse was, without any negligence or carelessness on the part of said company, flooded on December 28, 1904, by the bursting of a city water main one square and a half away from said cellar, and although they find that the damage to the plaintiff's poultry (if the jury find that it was damaged) was caused by such flooding, still if the jury further find that ordinarily prudent business men in the same business and under the same circumstances, in case they had stored similar goods in said cellar, would have provided and kept in working order some outlet or drainage from said cellar, and that the defendant did not provide or keep in working order such outlet or drainage from said cellar, then the plaintiff is entitled to recover in this case; provided, the jury further find that said flood of water would not have gotten into the ice box or freezer where the plaintiff's poultry was (if the jury so find) if the defendant company had provided such outlet or drainage and kept it in working order. (*Granted.*)

Plaintiff's 5th Prayer.—That even though the jury find that the cellar of the cold storage warehouse of the Baltimore Refrigerating and Heating Company was flooded on December 28, 1904, by the bursting of a city water main one square and a half away from said cellar, and that the damage to the plaintiff's poultry (if the jury find it was damaged) was caused by such flooding, the plaintiff is still entitled to recover in this case; provided the jury further find that the water from the city's main would not have gotten into the ice box or freezer built in said cellar where the plaintiff's poultry was (if the jury so find) if the defendant company

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had exercised reasonable care, as defined in the plaintiff's third prayer, in the construction of said ice box or freezer, or in keeping the doors to said ice box or freezer closed. (*Granted.*)

Plaintiff's 6th Prayer.—That if the jury find for the plaintiff, then the measure of damages is the difference between the market value of the squabs, ducks and chickens in their damaged condition and the market price of good and marketable squabs, ducks and chickens of the same kind at the various times when said poultry was delivered by the defendant to the plaintiff, with interest at six per cent. from March 1, 1905, in the discretion of the jury. (*Granted.*)

Defendant's 1st Prayer.—The jury is instructed that no sufficient evidence has been introduced to show that the damage to the plaintiff's poultry was caused by any negligence on the part of the defendant, the Baltimore Refrigerating and Heating Company, and their verdict must be in favor of said company. (*Refused.*)

Defendant's 2nd Prayer.—If the jury believe from the evidence that the plaintiff stored with the Baltimore Refrigerating and Heating Company the poultry mentioned in the evidence and that the said poultry was damaged while in the warehouses of the Refrigerating Company by reason of the bursting of the city water main, which caused the water to run into the said warehouse, and if the jury further find that the Refrigerating Company took such care of said poultry as a prudent man would take under similar circumstances of his own property, then the verdict must be for the defendant, the Baltimore Refrigerating and Heating Company. (*Granted.*)

Defendant's 3rd Prayer.—If the jury find from the evidence that the plaintiff stored with the Baltimore Refrigerating and Heating Company the poultry mentioned in the evidence and that the said poultry was delivered to the plaintiff in a damaged condition, and such condition was caused by the bursting of the city water main, the burden is on the plaintiff to show that there was any negligence on the part

of the Refrigerating Company which caused the damaged condition of the poultry. (*Refused.*)

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE and WORTHINGTON, JJ.

Robert H. Smith (with whom was *Jacob France* on the brief), for the appellant.

Bagby & Bagby, for the appellee, submitted the cause on their brief.

WORTHINGTON, J., delivered the opinion of the Court.

This suit was instituted by the appellee against the appellant to recover the amount of loss which the former sustained by reason of the deterioration in quality of a large quantity of dressed ducks, chickens and squabs which he (the plaintiff) had in cold storage for hire, at the defendant's cold storage warehouse at 410 S. Eutaw Street in Baltimore City.

The plaintiff alleges negligence on the part of the defendant in failing to exercise due and proper care in managing and maintaining its cold storage warehouse, wherefore the poultry became decayed, mouldy and partially unmarketable. The remote cause of the injury seems to have been the bursting on December 28, 1904, of one of the City's water mains on Eutaw Street about 500 or 600 feet north of the defendant's warehouse. The water from this broken main ran underground along one or more of the several pipe lines in the street, and some of it reached, and made its way into defendant's cold storage cellar, flooding the cellar to the height of four or five feet and submerging a number of boxes containing the poultry in question. The cellar remained in this flooded condition for twenty-four hours or more, before the leak could be repaired and the water from the cellar removed.

The ice box or refrigerator where the poultry was stored was the rear part of the cellar, being separated from the front

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part by a so-called insulated partition. In this partition was a door opening from the front part of the cellar, or vestibule, into the ice box. Under this door was a crevice one-sixteenth of an inch wide and four and one-half feet long. There was also a small gutter on each side of the cellar floor running under the partition, intended to carry off water used in washing the freezer or ice box. This water was collected by means of these little gutters in a hole in the vestibule part of the cellar and carried out from thence in buckets or barrels. There was, however, no drainage or sewer pipe in the cellar. These facts are undisputed. The plaintiff's witnesses also testified that a cold storage cellar was not a good place to store delicate poultry like this, because there would be more or less dampness about a cellar which would cause the poultry to mould and deteriorate. That poultry properly prepared and packed ought to keep from six to twelve months. That there was nothing in the nature of poultry, such as this to render it unmarketable or damaged from being left in cold storage for six months or more. That this poultry was put in cold storage when freshly killed, and after being carefully prepared and packed for that purpose. That it was put in during August, 1904, on to January, 1905, and about the middle of January a box of squabs was taken out and the squabs found to be discolored and dark, and all the poultry was found to be in such a damaged condition that it had to be sold for half price.

The defendant's witnesses testified that this cellar was dry as a bone and the proper place for the storage of poultry. That the temperature in the freezer was maintained at 4 to 13 degrees. Two of defendant's witnesses on cross-examination also testified that a freezer is made airtight, or is supposed to be airtight, but not necessarily watertight; that they did not provide against water.

In rebuttal two of the plaintiff's witnesses testified, against the objection of the defendant, that a well constructed cold storage cellar should contain a drain pipe or sewer to carry off any superfluous water that might get in there, and also

that a freezer or ice box should be made airtight and watertight.

During the progress of the trial the defendant reserved four exceptions, three to the rulings of the Court on the admissibility of certain evidence, and one relating to the prayers.

The verdict and judgment being for the plaintiff the defendant has appeared. 1st. The first exception is to the ruling of the Court in permitting the following question, propounded to the plaintiff, to be answered:

Q. "How about the poultry that you prepared and packed in July and August in other years, in the same way, and which you left until January and February following came out?"

Ans. "It came out all right."

It is of course well settled that the facts of the particular transaction are ordinarily the only legitimate evidence of the inquiry and the manner and cause of its occurrence, and not other and different occurrences. But it is equally well settled that facts occurring before or after the suit are admissible if they afford a fair and reasonable presumption of the fact to be tried; it being left to the jury to determine their precise force and effect. *Brooke v. Winters*, 39 Md. 505; *Davis v. Calvert*, 5 G. & J. 269.

In the present case this evidence was offered, as stated in appellee's brief, "as tending to show that the injury to the plaintiff's poultry was due to some act on the part of the defendant, and not to either the nature of the poultry itself, or to the way it was packed by the plaintiff."

While we do not think the question a proper one to have been asked or answered, under the circumstances of this case, for the reason that the facts sought to be elicited thereby related to other occurrences too remotely connected with the issue in this case to enable the jury to fairly infer therefrom, either that this particular poultry was properly prepared and packed, or that the injury complained of was due to negligence or want of care on the part of the defendant, yet

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we are unable to see in what manner the defendant was prejudiced by the answer given. In the case of *Baltimore, Etc., Co. v. Leonhardt*, 66 Md. 70, cited in support of defendant's contention as to this exception, the evidence was offered by the defendant to show that no accident had ever before happened to a passenger on the upper deck of one of its cars. This Court held that the evidence was properly excluded, the reason being of course that the defendant could not adduce evidence of proper care on its part, on former occasions as tending to show proper care on its part on the particular occasion then under investigation.

In the case of *Wise v. Ackerman*, 76 Md. 375, also relied upon by the defendant on this point, the offer was by the plaintiff to show that an accident, similar to that sued for in that case, had happened on a former occasion. This Court held the evidence inadmissible because it could not form "the basis of a well founded presumption as to the existence of negligence on the part of the defendant as the direct cause of the injury to the plaintiff," in the case then before the Court.

In the case at bar the evidence is offered by the plaintiff, and shows that on former occasions the poultry stored by plaintiff with the defendant came out all right.

While such evidence tended to show that the plaintiff had on former occasions properly prepared and packed the poultry stored by him with the defendant, yet, as we have said, the jury could not fairly infer therefrom how this particular poultry was packed or prepared.

At the same time it tended to show that there was nothing in the nature of dressed poultry such as this to prevent its keeping in good condition in a cold storage cellar, for several months, and also that the defendant did ordinarily manage and maintain its cold storage warehouse in a careful and proper manner.

The answer, therefore, taken altogether, was much stronger in favor of the defendant than of the plaintiff by whose counsel the question was propounded. For this reason we think this exception furnishes no reversible error.

2nd. The second and third exceptions relate to the action of the trial Court in permitting the plaintiff's witness, Gettier, in rebuttal, to answer the two following questions:

Q. "How ought a refrigerator situated as this used by the Baltimore Refrigerating and Heating Company to have been constructed?"

A. "All the refrigerators I have ever seen, and I have been in abattoirs here, and in Washington and in New York, and been all through all the abattoirs, and they all have sewers in the cellars.

"When the sewer main broke, it broke beside Swift & Co.'s warehouse, at the corner of Eutaw and Camden Streets, and we have as large, if not a larger cellar than the Baltimore Refrigerating and Heating Company, and we did not have a cent of damage because we had a sewer there."

Q. "I asked you how the ice box ought to have been constructed, or how they are usually constructed?"

A. "They are usually constructed airtight and water-tight."

The objection to these questions is in both instances on the ground that the witness had not shown proper qualifications to make him an expert on the subject of the construction of storage warehouses.

The admissibility of expert or opinion evidence is largely within the discretion of the trial Court, whose judgment is nevertheless always subject to review by this Court. *Dashiell v. Griffith*, 84 Md. 363.

It must be shown that the witness possesses such intelligence and such familiarity with the subject as in the sound discretion of the Court will enable him to express a well-informed opinion in regard thereto.

Some subjects of course require a much higher degree of intelligence and of special knowledge than others. It is therefore said that expert capacity is a matter wholly relative to the subject of the particular inquiry. In the present case besides the evidence of his qualifications contained in his answer to the first of the above questions, the witness had before the questions were put to him, testified that he was in

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the employ of Swift & Co. engaged in the packing business, and had charge of, and looked after the cold storage department, and had done so for eight years; that for the last twenty-two or twenty-three years he had been working in the cold storage business; that he had been employed at three or four places where there were cold storage plants, including the abattoir in Baltimore; that he had been through some of Swift & Co.'s cold storage plants in New York, Washington and Norfolk; that he looked after the produce end of Swift & Co.'s business, such as poultry, butter and eggs; that he had knowledge of defendant's plant from packing goods there for Swift & Co. We think these opportunities for observation, together with the experience which he was shown to have had in the cold storage business, qualified the witness to answer the questions propounded to him.

3. The fourth exception relates to the granting of the plaintiff's six prayers and to the rejection of two of the defendant's prayers.

All the prayers are set out in full in the report of this case preceding this opinion.

The principal objection urged by the defendant's counsel is to the granting of the plaintiff's second prayer. By that instruction the jury are told that if they find certain facts therein recited, "then the law presumes that the damage to said poultry was caused by the negligence of the defendant." The objection urged to this prayer is that it puts the burden of proof of negligence upon the defendant. More correctly speaking, it may be said to declare a *prima facie* case to have been made out, and to shift the burden of proof from the plaintiff to the defendant by the presumption of negligence, from certain facts recited, as a matter of law.

Several authorities outside of this State are cited by the attorneys for the respective parties in support of and against the correctness of this prayer.

But we think the substantial question has been passed upon and settled in at least two cases, heretofore decided by this Court.

One of these being the case of *Hamilton v. McGee*, 19 Md. 43. In this case an action was brought by a liveryman to recover damages for injuries to a horse which had been hired to the defendant.

This Court, speaking by BARTOL, J., said: "We agree with the appellant's counsel that the onus of proving want of diligence and reasonable and proper care was on the plaintiff. But surely it cannot be said that there was no evidence from which the jury might find a want of reasonable care in this case. The horse when hired was sound and in good condition; on the following evening, when returned, he was badly foundered, hardly able to walk, and died in a few days. One of the witnesses stated that in his opinion the horse was foundered by hard driving. On this point several witnesses testify that a horse may be foundered when properly and carefully used. But that was a question for the jury, properly left to them by the Court's instruction."

The other case in mind is that of the *American District Telegraph Co. v. Walker*, 72 Md. 454. In that case, The American District Telegraph Co. hired a boy to drive a two-horse team for the plaintiff. The horses ran away while in the boy's care, breaking the vehicle, and so seriously injuring one of the horses that it had to be shot, while the other horse was rendered unsafe to drive. In an action for damages against the Telegraph Co., this Court, speaking by CHIEF JUDGE ALVEY, said: "That if negligence or want of skill in the bailee or his servant be the ground of action, the onus of proof is on the plaintiff."

The former of these two cases comes under the third head of Lord Holt's division of the subject of bailments, as explained in his opinion, delivered in the case of *Coggs v. Bernard*, 2 Lord Raymond's Report, 919; and the latter under the fifth head of such division.

The fifth head includes all cases where goods are entrusted to the bailee for safekeeping, or to be carried, or to have some work done upon them, for hire to be paid to the bailee.

But under both heads, when negligence is the ground of

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the action, the burden of proving negligence is upon the bailor. The case at bar comes under the fifth head, and, according to the rule declared in the two opinions of this Court, just cited, the onus of proving negligence is on the plaintiff.

This does not mean, however, that the plaintiff must prove the specific acts of negligence which caused the injury, evidence from which the jury may infer such negligence is sufficient.

As in the case of *Hamilton v. McGee, supra*, while the Court held that the burden of proving negligence was on the plaintiff, yet, that there was evidence in the case from which the jury might infer negligence, without proof of the specific acts of negligence.

The vice of the plaintiff's second prayer is that it declares that negligence may under the circumstances set forth in the prayer be presumed as a matter of law, whereas it is for the jury to determine whether negligence may be inferred or presumed or not, taking into consideration all the facts and circumstances of the case.

The Court is to say whether any facts have been established by the evidence from which negligence may be reasonably inferred; the jurors have to say whether from those facts when submitted to them, negligence ought to be inferred. See *Schermer v. Neurath*, 54 Md. 491.

In the case of *Russell v. New York Steamboat Company*, 50 N. Y. 121, RAPALLO, J., speaking for the Court of Appeals of that State, says, at page 127: "The nature of an accident may itself afford *prima facie* proof of negligence, and we think, as the case stood, the Judge erred in not submitting the question of negligence to the jury."

In a later case from the same Court it is said, citing *Russell v. Steamboat Co., supra*: "While it is true, as a general proposition, that a bailor charging negligence on the part of the bailee, rests under the burden of proof, yet oftentimes slight evidence will shift the burden to the bailee." *Wintingham v. Hayes*, 144 N. Y. 1.

But that there is sufficient evidence thus to shift the burden of proof is not ordinarily for the Court to determine, but for the jury. In *Price's Case*, 29 Md. 420, this Court, speaking through ALVEY, J., says: "It is very true negligence may in some cases become a mere question of law to be determined by the Court, upon a given state of facts, either admitted or to be found by the jury. It is not, however, the duty of the Court to draw inferences or make deductions from evidence. To do that falls within the well-defined province of the jury, that Courts should be ever careful not to invade."

The circumstances of that case, it is true, were different from those in the case at bar, but the principle enunciated therein as quoted above is equally applicable here.

We think therefore that there was harmful error in granting the plaintiff's second prayer.

We understand that there is no objection to the remaining five prayers of the plaintiff, and we think these would fairly have instructed the jury had the erroneous second prayer been omitted altogether.

As to the defendant's first prayer, by which it was sought to withdraw the case from the consideration of the jury, we think it was properly rejected. There was evidence proper to be submitted to the jury from which they could have found want of proper construction of defendant's cold storage cellar, and ice box or freezer located therein, and that such want of proper construction was the proximate cause of the injury to the plaintiff's poultry.

The Court will not grant a prayer that there is no evidence legally sufficient to show want of reasonable care on the part of the defendant, unless there is no evidence in the case from which such want of reasonable care may reasonably be inferred by the jury.

As to the defendant's third prayer which was also rejected, while in the abstract it seems intended to express a correct proposition of law, yet not only is its phraseology somewhat obscure, by reason of the use of the word "caused," twice in

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different senses, in close connection with each other, but it also ignores the fact that the defendant's witnesses in testifying to the breaking of the water main and the flood of water that in consequence ran into the cellar of defendant, also testified to the fact that the freezer was not airtight or watertight, but that there was a crevice under the freezer door, and also an opening under the partition where the gutter was located, which crevice and openings allowed the water to run into the freezer, thereby causing the injury complained of, and also that there was no drain pipe or sewer leading from the cellar; from which facts the jury might have inferred want of due care without any further proof on the subject.

In order to make clear the objection to this prayer, it may be useful to say here a word upon the subject of the burden of proof.

As we have already stated, in this case, the burden is upon the plaintiff to show negligence on the part of the defendant; that is to say, the plaintiff must show that some negligent act or omission of the defendant was the proximate cause of the injury in order to entitle him to recover.

If the plaintiff, by his testimony in chief, make out a *prima facie* case, and the defendant, instead of producing evidence to negative the facts which the plaintiff's evidence tends to establish, proposes to show a distinct proposition which avoids the effect of the plaintiff's evidence, then the burden of evidence shifts and rests upon the party proposing to show the latter fact.

If evidence tending to prove this fact be adduced then the *onus* is cast again upon the plaintiff to show that notwithstanding such distinct fact the adverse party is still responsible because such fact does not excuse him. Such a defense amounts really to a plea of confession and avoidance. As is said by Thayer in his *Preliminary Treatise on Evidence*, "the parties are doing the work at the trial that it is the preliminary function of the pleadings to do. Practically they are pleading *ore tenus*."

In this case, the defendant confesses the injury, but under-

takes to avoid responsibility by showing the bursting of a City water main, and the flooding of its cellar in consequence. Such an occurrence, the testimony shows, had not happened before for at least sixteen years, and it is contended that it is one that the defendant could not be expected to provide against. But that was a question for the jury to determine, for if, notwithstanding such unusual occurrence, the defendant could, by the exercise of ordinary care and foresight, have averted the injury, he still must answer in damages to the person injured. *Van Zyle on Bailments*, secs. 202-203-204.

In undertaking to show, by way of confession and avoidance, that this unusual occurrence was the cause of the damage to the poultry, the defendant's witnesses, as we have already stated, also testified to facts which in the minds of the jury might have given rise to the inference of the want of ordinary care and foresight on the part of the defendant, without further proof on either side.

And besides this, the plaintiff in rebuttal did adduce evidence still further tending to show a faulty construction of the defendant's cold storage cellar, and had the defendant's third prayer been granted the jury might have inferred that, even if they deemed all the evidence taken together sufficient to warrant them in finding such want of ordinary care and prudence, yet that in the opinion of the Court some further evidence on the part of the plaintiff was necessary to justify them in so finding.

Negligence is a question for the jury to determine from all the facts and circumstances of the case, and not from the evidence of either party alone.

For these reasons we think the defendant's third prayer, if granted would have been misleading to the jury, and that under the circumstances of this case, it was properly rejected.

But for the error in granting plaintiff's second prayer, the judgment must be reversed and a new trial awarded.

Judgment reversed with costs to the appellant and a new trial awarded.

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Syllabus.

THE COUNTY COMMISSIONERS OF ANNE ARUNDEL COUNTY AND WALTER W. CROSBY, ENGINEER, ETC., vs. THE UNITED RAILWAYS AND ELECTRIC COMPANY.

Highways and Streets—Road Improvement Under Act of 1904, Ch. 225, Distinct from Building of Roads Under Other Statutes—Injunction by Taxpayer to Restrain Construction of Road When Statute Is Not Complied With—Right of County Commissioners Under Act of 1908, Ch. 654, to Require Change in Location of Electric Railway Tracks—Implied Repeal of Private Act by Subsequent General Act—Character of Road to Be Built by State Geological Survey.

The Act of 1904, Ch. 225, established a system for the improvement of highways at the joint expense of the State and of the counties, under the supervision of the State Geological and Economic Survey. It provided that in the improvement of a road under the Act, the County Commissioners should give written notices to the chief engineer of the survey of their intention to improve the road, which must be approved by the survey; that the advertisement for bids for doing the paving must be published for two consecutive weeks; that no contract for the same should be awarded if all bids exceed the amount specified. *Held*, that these requirements are not merely intended to safeguard the interests of the State, and are not merely directory, but they are for the benefit of the public generally and especially for the benefit of State and County taxpayers; that proceedings under this Act cannot be aided by provisions of the general law relating to the powers of County Commissioners in the repair of roads, and that a taxpayer is entitled to maintain a bill for an injunction restraining the execution of a contract for a road improvement made in violation of these statutory requirements.

The Act of 1904, Ch. 225, creates a method for the improvement of highways at the joint expense of the State and the counties distinct from, and independent of, the provisions of existing public general and local laws conferring upon County Commissioners power to construct and repair roads at the expense of the several counties. The two systems cannot be combined in the improvement of any one road.

The title of the Act of 1908, Ch. 654, is, an Act to repeal certain designated sections of the Code of Local Laws, title Anne Arundel County, sub-title, Roads, and all other local or general laws inconsistent with the provisions of the Act, and to re-enact the same with amendments. In the body of the Act, the Commissioners of that county were authorized to compel any railway company having tracks on the roads of the county, to change the rails and the location of the tracks and to pave and keep in repair the roads covered by the tracks with the same kind of paving material as might be used on the remaining portion of the road. At the time of the passage of this Act, the legislative charter of the Curtis Bay R. Co. (Act of 1890, Chap. 505) required that company to place its tracks on the margin of the roads along which it ran, and authorized the use of a certain rail. At the same session of the Legislature in 1908, a bill was introduced to compel that railroad company to change the location and character of its tracks, which bill failed to pass. *Held*, that the provision in the Act of 1908 relating to street railway tracks is not invalid as being in conflict with Constitution, Art. 3, Sec. 29, which requires the subject-matter of every law to be described in its title.

Held, further, that this Act does not repeal by implication, and was not intended to repeal, the provision in the charter of the Curtis Bay R. Co. relating to the location of its tracks, and that the County Commissioners are not authorized to require that company to change the location.

A prior special or private Act of the Legislature is not repealed by a subsequent general Act, unless there be an express reference to that previous Act or a necessary inconsistency between the two.

When the charter of an electric railway company authorizes the location of its tracks in a certain way, the Legislature can

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require a change in the location only upon fair principles of indemnity in respect to expenditures made by the company in reliance upon its charter.

The Act of 1904, Chap. 225, Sec. 4, provides that a road to be constructed under the system established by that Act, shall be a macadamized, or a telford, or other stone road, or a road constructed of gravel or of other good material. *Held*, that under this section, the choice of the kind of road to be constructed in any particular locality is confided to the judgment of the Geological Survey, and they may select a roadway of vitrified brick.

Decided January 20th, 1909.

Appeal from the Circuit Court for Anne Arundel County (BRASHEARS, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

James W. Owens, for the County Commissioners of Anne Arundel County, appellants.

Samuel K. Dennis (with whom was *James U. Dennis* on the brief), for Walter W. Crosby, appellant.

Joseph C. France and *James M. Munroe*, for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

The appeals in this case are from an order of the Circuit Court for Anne Arundel County overruling the appellants' demurrers to the appellee's bill for an injunction. The bill had been filed by the complainant in its two-fold capacity of a State and County taxpayer and the owner of property especially affected by the proceeding, which it sought to enjoin.

The main purpose of the injunction, asked for by the bill, was to restrain the defendants from proceeding with the execution or performance of a contract for the repaving of First street, commonly known as Light street No. 2, in the village of Brooklyn, purporting to have been made in accordance with a plan and specifications prepared under the supervision of the State Geological and Economic Survey for such repaving. The bill of complaint also prayed that sec. 196 of chap. 654 of the Acts of the General Assembly of 1908 be declared void in so far as it purports to authorize the County Commissioners of Anne Arundel County to compel the appellee to remove and relocate its existing tracks and overhead work on First street and repave certain portions of the street with vitrified brick, and that the County Commissioners be restrained from proceeding thereunder.

Both defendants demurred to the bill, but their demurrers were overruled by the order appealed from which directed the injunction to issue as prayed. Before the hearing of the demurrers the bill was amended by consent by adding thereto certain additional allegations of fact to be treated as if they had formed part of the bill when it was filed. Those allegations will be treated as part of the bill for the purposes of this opinion.

The principal allegations of the bill, as amended, are:

That the complainant, as successor of the Baltimore and Curtis Bay Railway Company, owns and operates a double track electric railway over the portion of First street sought to be repaved which extends about 1600 feet southerly from the county terminus of the long bridge.

That the tracks on First street were laid by its predecessor in strict conformity with the provisions of its charter (chap. 505 of Acts of 1890) which required them to be laid on the margin of the streets or roads occupied by them so as to leave a width of at least fourteen feet for vehicular traffic "unoccupied and undisturbed by said track or tracks."

That at the time the tracks were laid First street was private property and had not become a public road or street

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of Anne Arundel County, and therefore the complainant had acquired a private right of way over it by a deed, from its owner, the South Baltimore Harbor and Improvement Co., of which a copy is filed with the bill as an exhibit. At the time the charter of complainant's predecessor was granted and when the tracks were laid on First street and ever since then sec. 344 of Art. 23 of the Public General Laws of Maryland has provided, that: "In all cases where any passenger railway company uses the road bed or any portion thereof of any turnpike, street or road in any county of this State, it shall at all times keep in good and proper repair not only the portions of said turnpike, street or road which may be embraced between the rails of its track but also that part which shall extend for a distance of two feet on either side of said rails." That the complainant has fully complied with not only the requirements of its charter as to the location of its tracks but also with the provisions of the law in reference to keeping in repair the streets and roads on which they are located, and it is willing to continue to do so.

The bill further alleges that the defendants the County Commissioners and Walter W. Crosby as Chief Engineer of the State Geological and Economic Survey have entered into an arrangement for paving the portion of First street, traversed by the complainant's railway tracks, which is now an unpaved country road, with vitrified brick and the County Commissioners have awarded the contract therefor to H. E. Gray in pretended but not real conformity with the provisions of chap. 225 of the Acts of 1904, commonly known as the Shoemaker Road Law. That the said arrangement for so repaving First street is illegal and void because, the Shoemaker Road Law contemplates the construction or improving of public roads and highways at the joint expense of the State and County with macadamized or telford or other stone road or a road constructed of gravel or other good material, but it neither contemplates nor authorizes the paving of roads with vitrified brick which is far more expensive than either "telford" or "macadam" systems of road construction, which

use broken stone and are similar in character, and that a brick pavement would not be suitable for a road like First street.

It is further alleged that even if an arrangement for the paving of First street with vitrified brick could be made under the provisions of the Shoemaker Road Law the defendants in their attempted arrangement to utilize that law have failed to comply with its material provisions in that:

(a) No written notice was given to the Chief Engineer of the Survey on or before the 1st of March, 1908, of the intention of the County Commissioners to improve First street under the provisions of the Act as required by its first section.

(b) Nor do the records of the Survey show that there was ever any application made to it for or any consideration or approval by it of the paving or macadamizing of said street as required by section 2 of the Act.

(c) The advertisement for bids for the paving having run for but twelve days was not made in conformity with the provisions of section 6 of the Act which required it to be published for two consecutive weeks.

(d) The contract for said paving was awarded by the Commissioners at the price of \$12,100.00 (being \$506.00 in excess of the estimate therefor of \$11,594.00 made by the Chief Engineer of the Survey), in direct violation of section 7 of the Act which provides that "if all bids exceed the amount specified no contract shall be given."

(e) That there is an agreement between the County Commissioners and the Chief Engineer of the State Geological and Economic Survey under which the County Commissioners are to receive from the State, not one-half of the cost of paving the street with vitrified brick, but one-half of what a macadam road would cost if it were to be constructed in place of the brick pavement and no more.

The bill further alleges that the County Commissioners, under the assumed authority of the Act of 1908, chapter 654, have served upon the complainant a written notice requir-

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ing it at its own expense to take up its tracks from the margin of said street and relay the same in the middle of the street with girder rails instead of the "T" rails now in use and to pave between the tracks as relaid and for two feet on the outside of the outer rails with vitrified brick, all of which will involve the new construction of 1600 feet of the railroad at an expenditure of about \$16,000 upon a line which is even now operated at a loss. That the portion of said Act under which the County Commissioners assumed to act in serving said notice is found in section 196, and is as follows: "The County Commissioners shall have authority to compel any trolley or street railway company having or laying tracks on the public roads, avenues or streets of Anne Arundel County to change the rails and location of said tracks so as to make said roads, avenues or streets safer or better for travel, and to compel the said company or companies to pave and keep in repair the roads, avenues or streets covered by said tracks and extending two feet on the outer limits of either side of said tracks with the same kind of paving material with which the remaining portion of said roads, avenues or streets may be paved. The failure of any street railway company to comply with the provisions of this section shall be a misdemeanor and punishable by a fine of twenty dollars a day for each day the said railway company shall neglect to comply with the provisions of this section."

The bill then charges that the said portion of the Act of 1908, chap, 654, is invalid under sec. 29 of Art. III of the Maryland Constitution because the title to the Act, which is a local law purporting to amend the road law of Anne Arundel County, gave no notice that it embodied an attempt to amend the charter, of complainant's predecessor, by which the location of the tracks on said street is fixed and defined, or to alter the complainant's obligation as defined by sec. 344 of Art. XXIII of the Code of 1904, or to impose upon complainant the cost and expense of reconstructing its tracks and overhead work, or to attempt to make it a misdemeanor for it to exercise its charter rights. It is further charged that

said portion of the Act of 1908 is unconstitutional because it is special legislation intended to apply to and applicable at the time of its passage only to the case of the complainant. In that connection it is further alleged that at the Session of 1908 there was introduced on February 21, 1908, a bill known as House Bill No. 273 to require the Baltimore and Curtis Bay Electric Railway Company to move its tracks on First street in Brooklyn and change the same to girder rails and pave and keep in repair the pavement between said tracks and for two feet on either side thereof; and that the said bill failed of passage, and that subsequently the bill, which became the Act of 1908, chap. 654, and which by its title gave no notice to the complainant that its rights were intended to be thereby affected, was introduced and passed as House Bill No. 273.

The prayer of the bill is for a preliminary injunction restraining the County Commissioners from issuing or attempting to enforce any order requiring complainant to change the location of its tracks or to pave the street with an improved pavement, and the Chief Engineer of the State Geological and Economic Survey from approving the contract for the proposed paving or superintending its execution, and also restraining the County Commissioners from receiving any State money for the said proposed paving or spending any County money thereon; and that the portion hereinbefore quoted from the Act of 1908, chap. 654, may be declared unconstitutional and void and the defendants perpetually enjoined from proceeding thereunder; and that it may be adjudged and decreed that no State money can be expended under the Shoemaker law for vitrified brick pavement; and for general relief.

It is apparent from the allegations of the bill that the order overruling the demurrers to it was properly passed and must be affirmed, if for no other reason, because of the failure of the defendants to comply with the requirements of the Shoemaker Road Law in the several respects already mentioned. At the hearing of the appeal the appellants con-

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tended that those requirements of the law were intended to safeguard the interests of the State alone and not be invoked on behalf of private interests; or that they were to be regarded as merely directory, and requiring only a substantial compliance with their terms. They also relied, in support of their proceedings in reference to paving First street, upon the general powers of the County Commissioners in reference to the construction and repair of public roads, which sec. 15 of the Shoemaker Law declares that its enactment was not intended to abridge.

We cannot accept as correct either of these contentions. The Shoemaker Law contemplates the expenditure under its provisions of large sums of both State and County money and its carefully prepared and well considered requirements were intended, as we said in *Fout's Case*, 105 Md. 567: "to exclude favoritism, jobbery and dishonesty and to insure the application of business principles to the work to be done under the law." They were inserted in the law for the benefit of the public generally and especially the State and county taxpayers, upon whom the burden of providing the money for the contemplated improvement of the public roads must ultimately fall and they cannot be disregarded without endangering the purpose of their enactment. The provisions of other public general and local laws, conferring upon County Commissioners power to construct and repair roads at the expense of the several counties and regulating the exercise of that power, create a distinct system, independent of and different from that introduced by the Shoemaker Law, which was passed for the improvement of the public roads of the State at the joint expense of the State and the County in which the road lies. Both of these systems are statutory, and for that reason also in order to give validity to proceedings under either one of them the statutory requirements of that particular one must be complied with.

No countenance is found in the Code for an attempt to combine the two systems in the opening or improvement of any one road. Not only are the theories upon which the two

systems proceed separate and distinct but the statutory requirements of the one are inconsistent with those of the other. In the construction and repair of roads, under the general statutory powers of the County Commissioners, not only the survey and preparation of the plans for the work but its entire execution is required by the law to be under the "charge, control and supervision" of the County Road Engineer who is required to "make annually in writing a detailed report to the County Commissioners of all work done on the roads and bridges for the year" and the amounts due therefor, for the payment of which the Commissioners are required to make provision.

On the contrary, in all roads constructed or improved under the Shoemaker Law, the propriety of the undertaking must be determined and an estimate of its cost made by the State Geological and Economic Survey, and the surveys and plans therefor must be made by its engineer and if, as in the present case, the work is to be done by contract such contract must be approved by the Survey and executed and performed under its "immediate supervision," and the completion and cost of the work must be certified by it to the State Comptroller who, upon the compliance with certain specified conditions, pays one-half of the entire cost of the work, not to exceed the estimate previously made as above mentioned. Section 6 of the Shoemaker Law reserves to the County Commissioners of the county, in which the road to be constructed or improved is located, the right to reject the bids for the work and to have it done, according to the Survey's plans and specifications, by such arrangement as they may deem best, but, as a contract was made by the commissioners for the doing of the work in the present case, we are not concerned with the operation or effect of that feature of the law.

We might conclude our opinion at this point, as what we have already said renders it necessary to affirm the order appealed from, but in view of the request made by counsel at

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the argument of the appeal we will give expression to our views upon several of the other questions raised by the record.

Chapter 654 of the Acts of 1908 is technically a local Act affecting only Anne Arundel County, but it is of a general nature in that it provides a complete system for the construction, regulation and control of public roads by the County Commissioners. Its title is "An Act to repeal sections 191 to 203 v, both inclusive, and sections 203 w, 203 x, of Article II of the Code of Public Local Laws, title 'Anne Arundel County,' sub-title 'Roads,' and all other Acts or parts of Acts or provisions of the Code of Public Local Laws and the Code of Public General Laws, in so far as the said Acts or parts of Acts or provisions of said Codes may be inconsistent with the provisions of this Act, and to re-enact with amendments certain sections, to be known as sections 191, 192, 193 194, 195, 196, 197 and 198, of Article II of the Code of Public Local Laws, title 'Anne Arundel County,' sub-title 'Roads.'"

This Act ought not in our opinion to be held unconstitutional and void because its subject matter is not described in its title, but it does not therefore necessarily follow that it repeals or was intended to repeal the provision of the charter of the Baltimore and Curtis Bay Railway Company which requires that company to place its tracks on the margin of the streets and roads, along which it runs, so as to leave upon them a clear width of at least fourteen feet for the use of vehicles. The general control by the County Commissioners of the location of trolley and street railway tracks upon the roads, streets and avenues throughout the county is not necessarily incompatible with the continued exercise by one particular street railway company of existing chartered rights as to the position of its tracks upon streets and roads already occupied by it. The Act of 1908 does not either in its title or body designate or specify the Baltimore and Curtis Bay Railway Company or its tracks or the private Act by which it was incorporated or make any provision for compensation to it for the expense which had been incurred by it in constructing its tracks in their present location. Fur-

thermore the bill avers as indicative of the legislative intent in passing chap. 654 of Acts of 1908 that, at the same session of the Legislature at which that Act was passed, a bill known as No. 273 which on its face declared its purpose to be to compel the Baltimore and Curtis Bay Railway Company to make the very change in the location and character of its tracks on First street, which the County Commissioners are now seeking to compel it to make, had already failed of passage.

The fundamental fact to be ascertained, in determining whether a particular Act of legislation operates as a repeal of a former one, is the legislative intent in the passage of the latter Act. The intention to repeal may be manifested by a repealing clause containing a direct reference to the former Act, or it may be implied, with or without the presence in the latter Act of a clause repealing inconsistent prior legislation, from a necessary inconsistency between the provisions of the two Acts. In the many cases in which the Courts have passed upon the question of implied repeals of legislation by subsequent inconsistent legislation they have treated the language used in the Act supposed to effect the repeal as of the first importance, but they have also regarded the general character of the alleged repealing Act, the circumstances of its passage and the issues of public policy involved, as proper to be considered in arriving at a conclusion. The general principles applicable to cases like the present one, where the issue is between a prior private act and a subsequent one of a general nature, were stated by this Court in the case of the *State v. The Northern Cent. R. R. Co.*, 44 Md. 131, as follows: "It is unnecessary to review the many cases in which Courts have considered how far and under what circumstances a *subsequent general act* will be held to operate as a *repeal of a prior private act*. As a general rule, it will be admitted, that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous act, or unless there is a necessary inconsistency in the two acts. Where, however, the provisions of the general act are

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entirely inconsistent and irreconcilable with the provisions of a prior, private act, the former must necessarily operate as a repeal of the latter, because it is impossible for the two acts to stand together. * * * ”

This Court, acting upon the well settled doctrine that every reasonable intendment must be made that it was not the design of the State to surrender the power of taxation, or to exempt any property from its due proportion of the burden of taxation, has in different cases held subsequent general assessment or tax laws to repeal former private Acts granting to particular corporations a total or partial exemption from taxation. *Balto., Ches. & Atl. Ry. Co. v. Wicomico County*, 103 Md. 277 which was cited with approval and followed by the U. S. Supreme Court in *Commrs. of Wicomico County v. Bancroft*, 203 U. S. 212; *State v. Northern Cent. Ry. Co.*, 90 Md. 477, affirmed by the U. S. Supreme Court in 187 U. S. 266; *County Commrs. of Washington County v. Franklin R. R. Co.*, 34 Md. 159. In the following cases we have also upheld, in the situation there presented, the implied repeal of Acts of the Legislature by subsequent inconsistent legislation. *Willing v. Bozman*, 52 Md. 44; *State v. Yewell*, 63 Md. 120; *Yunger v. State*, 78 Md. 574; *Md. Agricultural College v. Keating*, 58 Md. 580; *State v. Falkenham*, 73 Md. 462; *Webster v. Cambridge Seminary*, 78 Md. 193.

In other instances we have held that the facts there presented did not justify the conclusion that the subsequent Act was intended by the Legislature to repeal the former one. *Frostburg Mining Co. v. C. & P. Ry. Co.*, 81 Md. 29; *Smith v. County Commrs.*, 81 Md. 513; *Garritee v. Baltimore*, 53 Md. 422; *Salisbury v. Jackson*, 89 Md. 523. In *Garrett v. Janes*, 65 Md. 26, under circumstances much resembling those of the case at bar, the Court held that there was no repeal by the subsequent Act although it in terms repealed “all inconsistent ordinances.” In that case an ordinance of Baltimore City passed in 1858 in pursuance of authority conferred on the Mayor and City Council provided: “It shall not be lawful for any person to erect or set up any

portico, steps or other ornamental structure whatever on Mount Vernon Place a greater distance into the Place than nine feet measuring from the building line thereof." A subsequent ordinance of the City passed, in pursuance of like authority, in 1874, fixed a shorter distance as a limit to which any steps, porch or portico might encroach from the building line upon any of the streets or alleys of the City, and in terms repealed all "inconsistent ordinances." It was decided that the ordinance of 1874 did not repeal the one of 1854, the Court saying in that connection: "There is no specific reference to the ordinance allowing 'any portico, steps or any other ornamental structure wha'ever' to extend nine feet into Mount Vernon Place, in that clause of the ordinance of 1874 which repeals 'inconsistent ordinances,' and regarding the former as a special and the latter as a general ordinance they should be considered *in pari materia*. They are not inherently incompatible. The general rule in the construction of statutes, applicable alike to the Act of 1854 and the Ordinance of 1874—is that a later one of a general nature does not effect the repeal of a special one unless direct reference is made to the latter with that intent, or in terms they are so irreconcilable that a repeal by implication is manifest."

In view of the principles of construction of statutes thus announced by our predecessors and the applications made of them in the decided cases, and also in view of the fact that the Legislature refused to pass House Bill No. 273 of 1908, which by direct reference to the Baltimore and Curtis Bay Railway Company would have so amended its charter as to compel it to make the change of the location and character of its tracks, we think it should not be held to have intended, in the passage of chapter 654, known as House Bill No. 315, to do by implication or indirection what it had a short time before refused to do directly, and amend the charter of that company.

It is of course within the power of the Legislature to so amend the charter of that company, by the passage of an Act appropriate for the purpose, as to require it to remove or to

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change the character and location of its tracks. In that event however the removal or change of the tracks could be enforced only upon fair principles of indemnity in respect to expenditures made by the company in good faith in constructing its tracks and overhead work along the margin of First street in conformity with and in reliance upon the terms of its charter, before the passage of the Act of 1908. As we held in effect in *Webster v. Cambridge Seminary*, *supra*, the Legislature could not under the guise of an amendment to the charter of the company divest without compensation its vested property right acquired in the legitimate exercise of the powers conferred by its charter while that instrument remained in force. See also to same effect *Lake Roland Ry. Co. v. Baltimore*, 77 Md. 381; *Wilderman v. Mayor*, 8 Md. 556; *Bramble v. Twilley*, 41 Md. 442; *Remington v. Metropolitan Bank*, 76 Md. 548; *Rock Hill College v. Jones*, 47 Md. 17-18; *Harris v. Whitely*, 98 Md. 442; *Jockey Club v. State*, 106 Md. 413.

Section 4 of the Shoemaker Road Law provides: "That the specifications shall require the construction and improvement, within a reasonable time, of a macadamized or of a telford or of other stone road, or of a road constructed of gravel, or of other good material, in such manner that the same will be with reasonable repairs thereto, at all seasons of the year, firm, smooth and convenient for travel."

The appellants contend that the Legislature did not intend by that section to restrict the roads, authorized to be made or improved, to the class known as Telford or Macadamized which are conceded to be similar in character, but intended by the use of those terms to fix a minimum and not a maximum standard of excellence and durability below which the Geological Survey should not descend in drawing specifications for the roads.

The counsel for the appellee, on the other hand, contends that the phrase "other good material" used in section 4 of the Law must be construed to mean material *ejusdem generis* with the material previously specified, as the law was obvi-

ously intended to provide for the construction of county roads and not for the paving of streets in towns and cities, as the expression paving nowhere occurs in the law. He further insists that if vitrified brick is to be regarded as "other good material" within the meaning of the Act then the appellee as a county taxpayer has the right to insist that the State must pay one-half the cost of paving the streets with such brick in the cases in which that material is selected by the Survey.

We concede soundness of the last proposition of the appellee, but we do not think the language used in section 4 of the Act, in describing the type of roads to be built and the character of material to be used in their construction, is sufficiently exact or positive to exclude all other kinds of road than Macadam or Telford. The expressions used "of a macadamized or of a telford, or of other stone road, or of a road constructed of gravel or of some other good material" are broad and alternative in character and manifest an intention on the part of the Legislature to confide to the technical skill and practical judgment of the members of the Geological and Economic Survey the selection of the designated types of road construction or their equivalents. The varieties of soil, location and exposure to be dealt with in so broad a scheme of road construction as that contemplated by the Shoemaker Law, and the different degrees of frequency and severity of use to which roads in the various portions of the State would most likely be subjected, necessarily required the allowance in the provisions of the Act of reasonable latitude in the selection of the type of road to be built in any particular locality and the material to be used in its construction. From such considerations, as well as from the general scheme and the provisions of the Act itself, it is reasonable to conclude that the Legislature in its passage did not intend to limit to one or two similar types all of the roads to be constructed under its authority. It is more rational to interpret the use of the expressions found in section 4 of the Act as manifesting an intention on the part of the Legislature to indicate to the members of the Survey, to which it confided the selection in

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each instance of the appropriate character of both road and material to be adopted, that such permanent and durable styles of construction be adopted as would increase the comfort and safety of travel and also yield an adequate return for the expenditure of public funds which they involved.

For the reasons stated in this opinion the order appealed from must be affirmed.

Order affirmed with costs.

MANO SWARTZ vs. THE GOTTLIEB-BAUERN-
SCHMIDT-STRAUS BREWING COMPANY.

*Goods of Third Party Taken Under Distraint for Rent—Right
of Action of Owner Against Tenant—When Trover
Lies—Measure of Damages.*

When the goods of a stranger found on rented premises are seized and sold under a distraint for rent against the tenant, the owner may buy the goods in at the sale, and recover the amount paid in an action against the tenant.

Certain property belonging to the plaintiff, and also property to which he was entitled under a chattel mortgage, was in the possession of a man who was a sub-tenant of the defendant, when this sub-tenant left the premises on which said property was and gave the keys to the defendant. After the plaintiff had demanded possession of the property and defendant had refused to give him the keys, the landlord issued a distress for rent against the defendant, under which plaintiff's property was seized and sold. *Held*, that the plaintiff is entitled to maintain an action of trover for his property, since plaintiff had demanded the same and been refused, and it was defendant's duty to protect plaintiff's goods from being taken for rent due by him.

Held, further, the measure of damages is the value of the goods at the time of the conversion, and in this case, the amount the goods sold for at auction under the distress proceedings is sufficient evidence of such value as against the defendant.

Decided January 12th, 1909.

Appeal from the Baltimore City Court (NILES, J.)

The trial Court gave the following additional instruction of its own motion:

If the jury find from all the evidence in the case that the premises Nos. 5, 7 and 9 E. German St. were leased by one Catherine T. O'Brien to defendant and sub-leased by the defendant to one Wm. G. Bolgiano, and if they shall further find that said O'Brien procured the distraint warrant mentioned in the evidence to be issued and the goods mentioned in the declaration to be sold thereunder, then:

1. If the jury find that the defendant had not accepted a surrender of the term of his sub-tenant Bolgiano, and again entered into possession of said premises prior to the issuance of said distraint warrant, their verdict must be for the defendant.

2. Even if the jury find that the defendant did accept a surrender of said term of his sub-tenant, and did again enter into possession of said premises prior to the issuing of said distraint warrant, still if the jury believe that prior to the issuance of said warrant there was no demand made upon said defendant by the plaintiff for a return of said goods, then their verdict must be for the defendant.

3. But if the jury shall find, from all the evidence that prior to the issuance of said distraint warrant, the defendant had accepted from his sub-tenant, Bolgiano, a surrender of all his interest in the said premises, and had himself entered again into possession thereof, and shall further find that prior to the issuance of said distraint warrant the plaintiff made demand upon the defendant for the delivery of said goods, and shall further find that the defendant either refused to

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make such delivery to the plaintiff or induced said plaintiff to withdraw its demand for such delivery by false statements made with intent of inducing the plaintiff to allow said goods to remain upon the said premises until they should be distrained upon by the defendant's landlord on account of rent owing by the defendant, and if they shall further find that said goods were subsequently taken and sold under said distraint warrant, then the plaintiff is entitled to recover.

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS and WORTHINGTON, JJ.

William S. Bayless and *J. Marsh Matthews* (with whom was *Hyland P. Stewart* on the brief), for the appellant.

Albert E. Donaldson (with whom were *Robert Crain* and *O. F. Hershey* on the brief), for the appellee.

BOYD, C. J., delivered the opinion of the Court.

The appellee sued the appellant in *assumpsit*, upon six common counts, and filed therewith an account which read: "To rent of said Manuel Swartz due and owing for use and occupation of premises No. 8 E. German Street, Baltimore City, paid by distraint on the goods and chattels of said Gottlieb-Bauernschmidt-Straus Brewing Company * * * \$360.00." The defendant filed the general issue pleas. The plaintiff asked leave to amend the declaration by striking out the six counts, to add an additional count, and to withdraw the account and affidavit filed with the original declaration. The Court granted leave to amend, and an amended declaration in *trover* was filed. The defendant filed the general issue plea, a jury was sworn, issue joined, and the case proceeded to trial, which resulted in a verdict for the plaintiff for \$389.93 damages. From the judgment entered on that verdict, this appeal was taken.

The defendant objected to the amendment of the declaration, but as there was no exception taken to that action, it is

unnecessary to discuss it; although we might call attention to the fact that in *Bonaparte v. Clagett*, 78 Md. 87, this Court recognized the right of the plaintiff, who had sued in *assumpsit* upon the six common counts, to amend the form of action to *trover*, and decided that bringing the action in *assumpsit* did not constitute a ratification of the contract of sale which would prevent an action of *trover* for the value of the goods, where before judgment the plaintiff discovered that he had misconceived his remedy, and, upon an amendment allowed, changed the form of action to *trover*. The only exceptions in the record are to the granting of the plaintiff's *second* prayer, as modified, and the Court's own instruction, and to the rejection of the defendant's *first, second, third, fourth, sixth* and *seventh* prayers, and overruling the special exception to the plaintiff's *second*.

A somewhat full statement of the facts will be desirable in order that our conclusions on the rulings on the prayers may be properly understood. The defendant (appellant) rented from Mrs. O'Brien No. 8 East German Street, under two written leases. The first was for three years from November 1st, 1905, and included the property known as No. 8 E. German Street in the Phoenix Building, and the room under it, known as 7 Phoenix Building. The other was for three years from January 1st, 1905, and included rooms 3, 5, 7, and 9, which are in the basement of the Phoenix Building and are the rooms in which the property in question was distrained on. Swartz assigned his lease to those basement rooms to William G. Bolgiano for the remainder of the term, but the landlady, while permitting the assignment, refused to accept Bolgiano as tenant, or to release Swartz from liability under his lease. On October 18, 1906, Swartz was in arrears for his rent to Mrs. O'Brien in the sum of \$400.00, and on that day a distress was levied on property found on the premises. The property so found was sold by the bailiff for \$361.55, and, after deducting the costs, \$295.37 was paid to the landlady on account of rent due her. On February 17, 1906, Bolgiano had purchased from Swartz, for \$500

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in cash, and \$150 by note, the stock, license, furniture, ornaments, glassware and other utensils then in the saloon. At the time the plaintiff owned certain other property which was on the premises. On March 7th, 1906, Bolgiano gave a chattel mortgage to the plaintiff on all the property on the premises which it did not own, to secure a loan of \$350.00. The property on account of which this suit was brought included that which the plaintiff *owned* and that which was embraced in its mortgage from Bolgiano, and was the property levied on and sold under the distress proceedings.

Bolgiano owed Swartz between three and four hundred dollars rent, besides the \$150 note, on October 13th or 14th (the witness was not certain as to the exact date), and he left the place before the distraint was levied. He went to the brewery, said he was sick and not able to manage the business and offered the keys to Mr. Hamburger, who represented the plaintiff. Mr. Hamburger told him to give the keys to Swartz, and Bolgiano sent them to him. Bolgiano testified he was a monthly tenant under Swartz. He paid Swartz the \$350 which he had borrowed on the mortgage from the plaintiff. Hamburger said he demanded the keys from Swartz on several occasions after they were sent to him, so they could get in and get the goods; that Swartz promised him the keys several times, but never gave them to him; that Swartz told him on several occasions he had a prospective buyer for the place, and the last time he said he wanted to hold the keys until the following morning, as he expected to have a customer then, but Hamburger said: "The next morning when I went there to see what was going on I found the constable in charge." He said he could not state the exact date when Bolgiano offered him the keys, but it was about the middle of October; that he went to Swartz to get the keys, "I guess probably about a week or four days or something like that," after he told Bolgiano to take the keys to Swartz. He said he told Swartz he wanted the keys to get the goods out; that he could not say exactly when he called on Swartz for the keys, but said: "Shortly after Mr. Bolgiano gave up the place

I went to see Mr. Swartz about getting the key of the place, and I made five or six requests of Mr. Swartz for that key between the time that Mr. Bolgiano closed the place up and the place was put in the hands of the bailiff."

The auctioneer identified a statement, dated the 25th day of October, 1906, which he had made of the sales to the plaintiff. A bookkeeper of the plaintiff testified that he knew of the distress proceeding by seeing a notice in the papers that the goods were to be sold at public auction; that he then went to Mr. Stewart's office and asked if he would be allowed to take out the goods; that Mr. Stewart said he would have to see Mr. Swartz, and he made an appointment to see Mr. Stewart later, when Mr. Swartz was present. He said that was before the sale. He told Swartz he wanted to remove the property belonging to the plaintiff and that covered by the chattel mortgage, and he replied Mr. Stewart had charge of the affair. He said: "He declined to allow me to act and to act himself and referred me to Mr. Stewart. This was all in Mr. Stewart's office. That the property of the plaintiff was not gotten out before the sale, but was sold. Witness told Mr. Swartz at the same time that he thought the easiest means would be the best, and that if he would not permit us to take our stuff out of there, there was only one thing for us to do, and that would be to bring action for the damage we sustained by the loss in having our property sold to pay the rent, and the property was sold." The witness also testified that the plaintiff paid the auctioneer \$244.50 for purchases made by it, and said there was a cash register mentioned in the mortgage. He asked Mr. Stewart at the sale why that was not offered, and he said he had given Mr. Swartz permission to take it from the premises, but he would speak to Swartz about it. Mr. Swartz called to see him about it, but he demanded it of him and he produced it; that the plaintiff still has it, awaiting the result of this case. The distress proceedings were taken out by Mr. Stewart, agent for the landlady.

The defendant denied any knowledge of the distress pro-

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ceedings until his wife saw a notice of the sale in the papers, and Mr. Stewart testified that it was not made in collusion with Swartz. There is no question in this State about the right of the landlord to distrain on the goods of a stranger on the premises, excepting such as are exempt by statute. That includes the right to distrain on the goods of a sub-tenant, and on those of the tenant or sub-tenant, although subject to a mortgage. But it is also well settled that a stranger whose goods are seized is entitled to redeem them and to be reimbursed by the lessee, or if they are sold he can recover the value from the lessee. *Edmunds v. Wallingford*, 14 Q. B. Div. 814; *Exall v. Partridge*, 8 T. R. 308; *O'Donnell v. Seybert*, 13 S. & R. 54; 9 *Am. and Eng. Enc. of Law*, 639. "A stranger whose property is sold under a distress may buy it in and recover the amount paid in an action against the tenant." *Ibid.*, Note 2, citing *Wells v. Porter*, 7 Wendell (N. Y.), 119; *Gear on Landlord and Tenant*, 151.

A great deal of the brief of the appellant is devoted to a discussion of the question whether there could be a recovery in an action of *trover*. There can be no doubt there was ample evidence to show that the plaintiff had the right of immediate possession at the time of the distress and sale. Most of the property in controversy belonged to the plaintiff, and the rest was included in its mortgage. It is true that the note secured by the mortgage was payable on demand, but there was a provision in the mortgage that "if the mortgagee shall at any time feel insecure, or shall desire to take possession of the same, then the whole indebtedness shall at once become due and the said mortgagee, its successors and assigns, agents or attorneys, shall have the right to take immediate possession of said property," etc. Bolgiano testified that some time in the month of October he went to the Brewing Company, "when he was in default of the payment on his chattel mortgage and the witness was about to leave the premises." He abandoned the place and told Mr. Hamburger: "He was sick and suffering from nervousness, and was not able to manage the place, and it was no use for him holding on any longer,

and here were the keys to the premises." Hamburger directed him to take the keys to Swartz as he testified, "because in the first place he had no right to it, because he was not the owner of the property, and knowing at the time that Swartz had a lease on the property, he was entitled to the key, and did not know how Mr. Bolgiano stood as to his rent with Mr. Swartz, and thought it was no more than due to Mr. Swartz to see that he got the key, and if any arrangement satisfactory between himself and Mr. Bolgiano could be made, he would give him a chance." There was, therefore, a surrender of the premises by Bolgiano to *somebody*, and under the mortgage, as between Bolgiano and the plaintiff, the latter undoubtedly had the right of immediate possession of the property included in it. As to the other property of the plaintiff, there could be no question about its right of possession.

That there was some evidence of demand being made before the distress is equally free from doubt. The testimony of Hamburger, as shown above, was that he demanded the keys of Swartz five or six times between the time Bolgiano closed the place up and it was put in the hands of the bailiff. Again, he said that he told Swartz he wanted the key, so as to take the goods out if no buyer could be found, "and Mr. Swartz told me that he had a prospective buyer that he would have there at the place the next morning following. That was the last time." He demanded the key in order to get the goods out, and it is useless to argue that there was a demand for the keys, but not for the goods.

There was also some evidence of conversion by Swartz. He not only did not give up the keys but, if Hamburger is correct in his statement, the jury could very properly have inferred that he was keeping them so the property would be there to be levied on. When Hamburger went there the next morning the place was in the charge of the bailiff. The evidence does not show where the bailiff got the keys to get in the premises, but as Swartz had them he must either have gotten them from him or through him, as it will not be presumed he committed a trespass in getting into the property.

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Swartz said that when Mr. Hamburger's son went for the keys, he told him he had sent them over to Mr. Stewart and added: "That was after the distraint"—whether he meant to say he sent the keys, or what he told Mr. Hamburger's son, was after the distraint is not clear, but the jury was not obliged to accept his statement, if he meant the former. He said in chief that he removed the cash register "when the sale was to take place," and on cross-examination he said he "sent a boy to the premises for the cash register on the same day that the keys were brought up by Mrs. Bolgiano. The key was sent the witness a day or two before the distraint was made; don't think it could have been longer than two days; might have been three."

Mr. Stewart said he "asked Mr. Swartz a number of times to pay the rent before distraint was issued. Witness does not think he told Mr. Swartz he was going to distraint, but told him somebody had to pay the rent, as he could not let it run on that way; that he was not going to wait any longer; will not swear that he did not tell him he was going to distraint. May have told him he was going to distraint if rent is not paid, but does not remember whether he did or not." As Mrs. O'Brien looked to Swartz for the rent, the jury might very properly have inferred that Mr. Stewart did tell him, and under all the circumstances it would be difficult to believe that Swartz did not know that there would be a distraint.

So without further referring to the testimony, there was unquestionably some evidence tending to show that Swartz had taken possession of the premises; that demand was made on him, and that he knew there would be distress proceedings taken out, as well as some evidence from which the jury could infer that Swartz was holding the keys until they were, so that the plaintiff's goods would be seized for his rent. It is said in 1 *Poe*, sec. 522, that "any wrongful interference with the owner's possession or right of possession is in law either a conversion itself, or evidence from which a previous or continuing conversion may be implied;" and again in the

same section: "In short, anyone who, without authority, interferes with the rightful owner's absolute dominion over his goods, whether he do it for his own personal advantage or for the advantage of another, or through inadvertence, or under a mistake as to his own legal rights, or otherwise, may be made responsible in *trover*." That is said under the discussion of the form of declaration provided for in the Code, which has materially modified and changed the declaration in *trover* formerly in use in this State.

So if it was necessary to show that there was evidence sufficient to sustain the action of *trover*, there is such in this record, but there is no prayer which distinctly raises the question of pleading. None of the prayers refer to the pleadings in any way whatever, excepting the defendant's *third* and *fourth*, which do speak of the property "mentioned in the declaration," but those prayers were defective for reasons we will state presently, even if they be said to be sufficient to call the Court's attention to the pleadings. When prayers do not refer to the pleadings, "the right to recover depends not upon the form of the action or the state of the pleadings, but solely upon the case made by the proof," as was said in *W. Va. C. R. Co. v. Fuller*, 96 Md. 652, and other cases.

What we have said is sufficient to show that in our judgment there was no error in rejecting the defendant's *first* prayer, which sought to take the case from the jury on the ground that there was no legally sufficient evidence to entitle the plaintiff to recover. The *second* was also properly rejected. The complaint of the plaintiff is that *the defendant* owed the landlady rent for which the plaintiff's property was taken under distress proceedings against him. He had not issued a distress warrant against Bolgiano, and if he had, other questions would have arisen—such as whether he had not accepted a surrender of the premises, etc. The *third* prayer asked the Court to instruct the jury "that there was no privity of contract or estate between the defendant and the plaintiff, and hence no duty or obligation on the part of the defendant to protect the plaintiff's goods from distress while on the prem-

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ises mentioned in the evidence in the possession of the defendant's tenant," etc. Privity of contract or estate was not necessary under what we have said, and it was the defendant's duty to protect the plaintiff's goods from being taken for rent due by him. The defendant's *fourth* prayer was sufficiently covered by the Court's instruction, but at any rate it was misleading with reference to "actual possession," as the jury might have thought he had to be actually on the premises at the time of the distress. The *sixth* prayer was also properly rejected. Without discussing it at length, the concluding part was sufficient to cause it to be rejected—that "the refusal of the defendant to deliver said key to the plaintiff, if they find such refusal, was not a taking of possession or conversion." It was evidence of conversion under the circumstances of this case, as we have shown above. The *seventh* is clearly not in accord with the authorities as to the measure of damages, which in *trover* under our rule in this State is the value of the chattels at the time of conversion, with legal interest thereon up to the date of the verdict. 1 *Poe*, sec. 219, and cases cited. It follows from what we have said that the measure of damages as stated in the plaintiff's *second* prayer was correctly announced. The modification by the Court of the prayer as offered was: "And the only evidence in this case as to value is the gross amount which said goods brought at the auction sale mentioned in the evidence." That was sufficient evidence of the value—at least so far as the defendant was concerned, as no evidence of their value could have been offered which would have been fairer to him. There was nothing to show that any unusual prices were received, and surely a sale under distress proceedings will not be presumed to be for more than the goods are really worth. What we have said above applies to the defendant's special exception to that prayer. The Court's instruction gave the defendant the benefit of all he was entitled to. The objection urged that there was no legally sufficient evidence of some of the questions submitted in it is not only answered

by what we have said above, but there was no special exception to the instruction on that ground.

It follows from what we have said that the judgment must be affirmed.

*Judgment affirmed, the appellant to pay
the costs, above and below.*

STATE OF MARYLAND, FOR THE USE OF MARY
E. LINTON, WIDOW, vs. BALTIMORE MAN-
UFACTURING COMPANY.

Master and Servant—Falling Into Vat of Boiling Molasses.

In defendant's vinegar factory, there was a molasses room, 40 ft. by 27 ft., where molasses was boiled in a vat, 6 ft. in diameter and $3\frac{1}{2}$ ft. deep, the top of which was flush with the floor of the room, and no guard rails were around it. When molasses was being boiled, the steam arising obscured to some extent the view in the room. Plaintiff's deceased was employed as a laborer in another part of the factory, and none of his duties required him to enter the molasses room, and although he had on some occasions passed through it in going to other parts of the factory, it was not necessary for him to do so. In some way not explained, he fell into the vat of boiling molasses one morning, and suffered injuries which caused his death. In an action to recover damages therefor, *held*, that since there is no evidence of defendant's negligence in failing to provide a safe place for the deceased to work in, as he was not employed to work in the molasses room, and since he had knowledge of the unguarded position of the vat into which he fell, and the danger was not hidden, and he voluntarily exposed himself to it, there can be no recovery in this case.

Decided January 12th, 1909.

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Appeal from the Court of Common Pleas (HARLAN, C. J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and WORTHINGTON, JJ.

Joseph N. Ulman and Clarence A. Tucker, for the appellant.

Vernon Cook and Wilton Snowden, Jr., for the appellee.

THOMAS, J., delivered the opinion of the Court.

The appellant, Mary E. Linton, plaintiff below, brought this suit to recover damages for the death of her husband, Robert A. Linton, which she claims resulted from the negligence of the appellee, the Baltimore Manufacturing Company.

The deceased was in the employ of the appellant, and to maintain the action it was necessary for the appellee to allege and show that the appellant was negligent in the performance or non-performance of some duty it owed him, and that his death was the result of such negligence, without any negligence on his part, directly contributing thereto. So the declaration, which contains two counts, charges in the first count, as the negligence complained of, that the appellee did not furnish the deceased with a "safe and proper place in which to do and perform the work required of him, and did expose him to unnecessary risk or danger while so employed in that the defendant on or about the 18th day of November, 1906, assigned him to work in a room in their said plant where there was a large cistern or vat filled with boiling molasses, the mouth of which said cistern was flush or nearly so with the surface of the floor, and which was negligently left without guard rails or other proper protection;" so that the deceased, while in performance of his duties and being unable to see or locate the said cistern or vat by reason of the fact that said

room was filled with steam, without any want of care on his part, fell into said cistern or vat and received injuries from which he died. The second count is the same, except that it charges that the injury was sustained while the deceased was "in the performance of his duties about the premises," etc.

There are two exceptions in the record, one to the admission of certain evidence, and the other to the refusal of the Court to grant plaintiff's prayers and to the granting of defendant's first prayer, instructing the jury that the plaintiff had offered no evidence legally sufficient to show that the defendant had been guilty of any negligence in respect to any duty owing by it to the deceased, and that their verdict should be for the defendant.

The prayer does not refer to the pleadings, and hence in determining whether there was error in refusing to submit the case to the jury, we must examine the evidence without reference to the allegations of the narr., which however, we have set out as showing the theory on which the appellant claimed the right to recover.

The appellee is a corporation, and was engaged in the manufacture of vinegar, with its factory located in Baltimore City, on the corner of Madison and Van Buren Streets. That part of the factory building to which the evidence in this case refers, consists of a molasses room, vinegar room, boiler room, areaway, office, hallway, etc. The molasses room, where the injury occurred, is about forty feet long and about twenty-seven feet wide, and is located on Courtney and Falls Streets. On the Courtney Street side there were three large windows, and one window on the Falls Street side. The light through one of these windows was somewhat obstructed by a vinegar tank in the room, and there was a large molasses tank on the outside of the room which interfered with the light from one of the other windows. On the Courtney Street side there was a large door, and across the room, near the northwest corner, there were two steps leading up to another door opening into an areaway, from which you enter a hallway leading

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to the office, boiler room, etc., and from which there is also a door opening into the vinegar room. To the left of, and about two and one-half feet from the steps, as you approach them in the molasses room, and near the west wall of the room, is the molasses vat, six feet in diameter and about three and one-half feet deep, the top of which is described as being flush with the floor of the molasses room; and to the right of the steps, and near the north wall of the room, is a pump, used to pump the molasses, after it is boiled in the vat, to another part of the building. From the pump a two and one-half inch pipe runs on top of the floor to the vat, a distance of about four feet, so that in going to the steps from the molasses room, and after coming down the steps from the areaway, you have to step over this pipe. The vat was used for boiling molasses, and on the day of the accident there was no railing around it. The molasses is heated by steam from a steam pipe running from the boiler down into the vat. When the steam is turned on it comes up through the molasses and escapes in the room. It takes from ten to fifteen minutes to boil the molasses, and as soon as it is boiled the steam is turned off, the pump is started and the molasses is pumped out of the vat. When you enter the molasses room through the Courtney Street door there is nothing to obstruct the view of the vat, except when the molasses is being boiled the steam rises above the vat and escapes in and darkens the room somewhat, particularly when the door and windows are closed, as is generally the case on Sundays. Some of plaintiff's witnesses go to the extent of saying that the room is sometimes so dark that a cautious man has to feel his way by putting his hands against the wall so as to make certain of avoiding the vat, but even then you can see where the steam is coming up out of the vat. Plaintiff's expert witness, Varney, says that a sudden burst of live steam, which he distinguishes from the ordinary condensed steam or vapor, has a bewildering effect upon a nervous man, not accustomed to it, and that if a man was coming down the steps from the areaway to the molasses room while the molasses is being boiled, in his

opinion, enough steam would come over him from the vat, "to affect him;" that if he was familiar with his surroundings and knew his place "a sudden gush of steam would not rattle him, but if he had no knowledge of his surroundings it most assuredly would."

The accident which caused the death of the deceased occurred on Sunday morning, between seven and eight o'clock. He had been working at the factory as a laborer for about two months, and worked there on one Sunday previous to the day of the accident, but he had never been assigned to any work in the molasses room, and his duties did not require him to go into that room, and on the morning of the accident his work was in the vinegar room. While there were a number of other entrances to the factory, the employees, without any notice from the company not to do so, in going out of and coming in that part of the factory, frequently went through the molasses room, as a shorter and a more convenient route, and the deceased was known to have gone that way at least five times, when they were not boiling molasses, and once when they were pumping molasses, and to have been at work at the Courtney Street door unloading molasses. The plaintiff did not produce an eye witness to the accident, but plaintiff's witness, Hartman, testified that he, witness, was sitting in the center office, and from this office you "pass through a hallway leading to the areaway from which you turn off to the right to go into the vinegar room and to the left to go into the molasses room," and that while sitting there the deceased came in on his way to the vinegar room, where his duties that morning required him to be, and talked to witness for a few minutes and then went out to go to the vinegar room. He did not say he was going to the vinegar room, but witness thought he was because witness "knew he was there to work in the vinegar room." That about five minutes after he left the office he heard him cry out, and that witness went out and met him in the hallway; that he "was nude and covered with molasses, his skin crimped as though he had been burned;" that witness looked into the molasses room, the steam had

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been turned off, and there was not as much steam in the molasses room as he had seen on previous Sundays, and that he didn't think that deceased had had time, after he left witness, to go out of the vinegar room and come in the Courtney Street door of the molasses room; that he "couldn't get through there on Sunday while cooking molasses" on account of steam, "couldn't see where he was going," "he would have to feel his way," and that he, witness, would not think of attempting it.

The only persons who were in the molasses room at the time and who saw the accident, are defendant's witnesses, Saunders and Powers, who worked in that room. Saunders was engaged in boiling the molasses, and Powers was looking on. They both state that there was very little steam in the room at the time "which rose above the vat;" that there was an electric light over the vat, and that there was nothing to obstruct the view of the vat from the Courtney Street door; that Saunders had finished boiling the molasses and had turned the steam off, and was about to start his pump when the Courtney Street door opened, and they turned around and saw the deceased coming in that door. Saunders says that after looking towards the door and seeing the deceased, he turned to start the pump and the next thing he heard was the splash, and he turned around and saw the deceased in the vat; that the deceased came in that door and walked across the room to the vat, a distance of twenty-nine feet, and that there was no reason why he could not have seen the vat. Powers states that he was looking right at the deceased, that he passed him, witness, and went to the edge of the vat ("witness not thinking that he was going into it"), and fell in on the Courtney Street side, and they helped him out on the other side.

It is apparent that these facts do not make out the case stated in the declaration, which charges as the negligence complained of, that the defendant failed to provide for the deceased a safe place in which to do the work for which he was employed, as plaintiff's evidence shows that the deceased

was not employed to work in the molasses room, and that none of his duties required him to go in there. This case does not, therefore, resemble the cases of *Winkelman & Brown Drug Co. v. Calladay*, 88 Md. 78; *Brager v. Austin*, 99 Md. 473, and *Am. Tobacco Co. v. Strickling*, 88 Md. 500, where the Court was dealing with the duty of employers to provide safe places and appliances for their servants while in the performance of the work for which they are employed.

But it is insisted that the defendant permitted without objection the employees in the factory to go through the molasses room in going in and out of the factory, and that they usually went out and came in that way, and that it therefore became its duty to make that route reasonably safe for them. One of the inferences to be drawn from this evidence is that the deceased, as one of the employees, so used the molasses room, in common with the other employees, and that he was, therefore, familiar with the room, knew of the vat, etc. But this is not left to inference, the uncontradicted evidence of defendant's witnesses being that he had passed through this room at least six times, and within three feet of the vat, when there was no steam from boiling molasses, and when, as he came down the two steps from the areaway, he could look right down into the vat, and it would be unreasonable to suppose that he did not see it, and that he worked at the Courtney Street door, where he had an unobstructed view of the room and the vat.

Assuming that the deceased in using this room in going in and out of the factory was not a licensee, the rule as stated in *Woods v. Heiges*, 83 Md. 268, is that "If a servant has knowledge of the circumstances under which the employer carries on his business and chooses to accept the employment, or continue in it, he assumes such risks incident to the discharge of his duties as are open or obvious. In such cases it is not a question whether the place prepared for him to occupy, and which he assents to accept, might, with reasonable care, have been made more safe. His assent dispenses with the performance on the part of the master of the duty to make it so."

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And this Court in the case of *Gans Salvage Co. v. Byrnes*, 102 Md. on page 247, said that "One who remains in a service which necessarily exposes him to hazardous risks from causes open and obvious, the dangerous character of which he knew or had an opportunity of knowing, must be considered as having assumed such risks, and if injured in consequence thereof, has no claim against the employer." And in the case of *Linton Coal & Mining Co. v. Persons*, 43 N. E. Rep. 651, the Supreme Court of Indiana, speaking of the duty of a servant, quotes, with approval, from *Bailey, Mast. Liab.*, p. 162: "He must use reasonable care in examining his surroundings, to observe and take such knowledge of dangers as can be attained by observation. In performing the duties of his place, he is bound to take notice of the ordinary operation of familiar laws, and to govern himself accordingly. If he fails to do so, the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person using his eyes; and if the defect is obvious, and suggestive of danger, knowledge on the part of the servant will be presumed, as well as when the dangers are the subject of common knowledge." *B. & P. R. R. Co. v. Abbott*, 75 Md. 152; *Eckhart v. Lazaretto Guano Co.*, 90 Md. 189; *Tkac v. Md. Steel Co.*, 101 Md. 179; *Feely v. Pearson Cordage Co.* (Mass.), 37 N. E. Rep. 368; 26 *Cyc.*, p. 1213, sec. 6.

This rule applies with much greater force to a servant whose duties do not subject him to the risk, but who voluntarily exposes himself to it in pursuit of his own convenience. *Tkac v. Md. Steel Co.*, *supra*; 26 *Cyc.*, p. 1224, sec. 9.

Where, however, the risks to which a servant is exposed arise from causes hidden or secret, the master is bound to notify him of them, provided he himself knows, or by the exercise of ordinary care ought to have known of them (*Wood v. Heiges*, *supra*), and appellant contends that the risks to which the deceased was subjected by reason of the bewildering effect of live steam were not obvious but secret, and such as made it the duty of the defendant to warn him against them. The only evidence bearing upon this feature of the

case is that of plaintiff's witness, Varney, who, as we have said, states that a certain burst of live steam has a bewildering effect upon one not familiar with its surroundings, and that if a person was coming down the steps from the areaway to the molasses room, when the steam was *turned on* and the molasses was being boiled in the vat, enough live steam would escape through the molasses and envelop him to rattle one *not familiar* with his surroundings. But if we assume that the deceased on the occasion of the accident entered the molasses room by way of the steps leading down from the areaway (of which, however, there was no evidence), the evidence of plaintiff's witness is that when he looked into the room immediately after the accident the steam was turned off, and that there was less steam in the room than usual on Sunday; while the evidence produced by the defendant shows that he entered the room from the Courtney Street door; that the steam had been turned off; that there was very little steam in the room; that an electric light was burning over the vat, and that there was nothing to obstruct his view of the vat. So that the conditions under which plaintiff's witness states that a person not familiar with his surroundings would be subjected to the hidden risks referred to, even assuming that the deceased did not know of the vat, etc., are not shown to have existed. Moreover, there is no evidence in the case to show that the defendant knew, or by the exercise of reasonable diligence could have known of the secret risks from exposure to live steam. The defendant's witnesses testified that they had worked in the room for years and had not discovered any such effect from it. *Am. Tobacco Co. Case, supra.*

Treating the case from another point of view, and assuming (as we must do, for there is no evidence in the case to show it, and the only evidence in the case is to the contrary), that the deceased had never been in the molasses room before, knew nothing of the conditions or of the existence of the unguarded vat; that he entered from the areaway when it was so dark in the room that it was necessary for one to feel his way by touching the wall, and when the conditions

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were such, as stated by plaintiff's witness, Hartman, that he would not have thought of venturing in. Under such circumstances, and when, after two months' employment at the factory, he must at least have known that he was in the molasses room, and that there were probably in there dangerous appliances, to which he would be exposed and might encounter in the dark; when he was impelled not by any sense or call of duty, but by some plan or convenience of his own, upon what possible theory of right or justice could the plaintiff expect to recover?

Where one voluntarily acts in such entire disregard of his own safety, the unfortunate sufferers from his want of care and prudence can have no claim upon others to bear the consequences of his own negligence. This rule is so in harmony with a proper sense of justice, and has been so frequently recognized by this Court, that we will not refer to the many instances of its application, but will simply repeat what was said in *Balto. & Yorkt'n T. Rd. v. Leonhardt*, 66 Md. 70: "If indeed the conduct of the plaintiff below showed a reckless disregard of his safety, it was the duty of the Court to declare as matter of law, that it was such negligence as entitled the defendant to a verdict."

On the other hand, if we accept the evidence of the defendant as to how the accident occurred, already referred to, the deceased entered through the Courtney Street door and fell into the vat, the existence of which he must, or by the exercise of reasonable care ought to have known of, under circumstances of such gross negligence on his part, as disentitles the plaintiff to any claim against the defendant. *Meister v. Alber*, 85 Md. 72; *Reidel v. P., W. & B. R. Co.*, 87 Md. 153; *Paterson v. Hemenway*, 148 Mass. 94.

So, therefore, in no aspect of the case as presented by the evidence was the plaintiff entitled to recover, and where that is the case, it is the duty of the trial Court to take the case from the jury, *B. & O. R. R. Co. v. Belinski*, 106 Md. 452, and as we must affirm the ruling of the Court below in so doing, it becomes unnecessary to consider the other exceptions in the record.

Judgment affirmed with costs.

IRVING MILLER vs. MARGARET B. LEIB.

Hypothetical Question to Medical Expert—Order of Production of Evidence—Action Against Physician for Negligence in Diagnosis and Treatment—Instructions to the Jury.

A hypothetical question put to a medical expert must not only be based upon the facts in evidence, but must not give a false coloring to those facts by unduly emphasizing some of them or not mentioning others.

In an action against a medical man for ignorance and negligence in the diagnosis and treatment of plaintiff's broken hip, there was evidence that at the time of suffering the injury and afterwards, plaintiff had tuberculosis, and the evidence was to the effect that the treatment of a patient for a broken hip should be different if that patient also has tuberculosis from what it should be if the patient's general health is good. Under these circumstances, a hypothetical question to a medical expert as to the proper treatment for the surgical injury which fails to mention the tuberculosis of the patient is erroneous.

Evidence that a witness summoned a physician at a certain time by telephone and that he responded is admissible, although the witness did not recognize his voice, when it is shown that he did afterwards call in response to the summons.

It is within the discretion of the trial Court to allow a plaintiff to offer evidence in rebuttal which was properly admissible as evidence in chief.

Plaintiff, a woman sixty-one years old, fell and fractured a femur in November. The defendant, her family physician, was called in to treat her, and she was subsequently taken to his sanatorium. No operation on the broken hip was performed or directed by him, but plaintiff's leg was merely kept in position by sand bags and afterwards by a plaster cast and extension. She left defendant's sanatorium in the following February in a lame condition. Two weeks afterwards, she

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called in a surgeon who performed an operation, removing the broken end of the femur and making a new thigh joint which gave her the use of the injured leg. In an action to recover damages for the defendant's alleged negligence in his treatment of the plaintiff, defendant's evidence was to the effect that the plaintiff was at the time of the accident, and afterwards, suffering from tuberculosis; that her temperature rose to a dangerous point, and that it was not the proper treatment to perform a surgical operation on her at that time. *Held*, that an instruction authorizing a verdict for the plaintiff if the jury found that certain specified mistakes were made by the defendant in his diagnosis of plaintiff's case, and that there was a failure by him to exercise ordinary care and skill in specified respects in his treatment, is erroneous, because it is silent as to the evidence concerning the tuberculous condition of the plaintiff, and therefore withdrew from their consideration that evidence.

Held, further, that a prayer instructing the jury that the plaintiff was entitled to recover if the defendant did not exercise reasonable care and skill in ascertaining the nature of her injury and in his treatment was not erroneous, when granted in connection with another prayer instructing the jury not to allow damages for such delay in defendant's treatment of plaintiff's hip as resulted from his diagnosis that she was suffering from tuberculosis.

Decided January 13th, 1909.

Appeal from the Baltimore City Court (NILES, J.), where there was a judgment on verdict for the plaintiff for \$2,000.

Plaintiff's 2nd Prayer.—If the jury find that the defendant was a physician and surgeon, and that the plaintiff fell and sustained a fracture of the neck of the femur, and that the defendant was called upon to treat the plaintiff and undertook to treat her, then it was the duty of the defendant to exercise reasonable care and skill to ascertain the nature of the plaintiff's injury, and to use the proper treatment therefor. And if the jury find that the defendant did not exercise reason-

able care and skill to ascertain the nature of the plaintiff's injury, and that by reason of his failure to exercise such reasonable care and skill, the defendant erroneously concluded that the plaintiff had not sustained any fracture, and by reason of such error failed to give the plaintiff reasonably careful and skilful attention and treatment for such fracture, or if the jury find that the defendant did ascertain that the plaintiff had sustained a fracture of the neck of the femur, and shall further find that the defendant did not exercise reasonable care and skill in his attention and treatment therefor; and if the jury further find that, at the defendant's suggestion, the plaintiff was removed to his private sanatorium, and that there the defendant continued to treat her for a long time, and that after long treatment by the defendant, the plaintiff remained entirely without any use of her said limb, and continued in that condition until subsequently relieved by the proper treatment from another physician; and if the jury further find that by reason of said failure on the part of the defendant to exercise reasonable care and skill in ascertaining from what the plaintiff was suffering or in applying the proper treatment therefor, the plaintiff has suffered pain and loss of the use of her limb which she would not have suffered if the defendant had exercised such reasonable care and skill, then the verdict of the jury should be for the plaintiff. (*Granted.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

William Colton and Vernon Cook (with whom were *Gans & Haman* on the brief), for the appellant.

S. S. Field (with whom were *Gill & Preston* on the brief), for the appellee.

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SCHMUCKER, J., delivered the opinion of the Court.

This is an appeal from a judgment of the Baltimore City Court recovered by the appellee against the appellant, her family physician, for alleged negligence in treating her when ill. There is evidence in the record tending to show the following state of facts:

The appellee, Mrs. Leib, a widow of slender build, sixty-one years old, fell and fractured a femur while walking across her bed room at noon of Saturday November 19th, 1905. She was then residing with her adopted sister, Mrs. Burke, at Irvington, a suburb of Baltimore City, distant three-quarters of an hour to an hour from the office and sanitarium, of the appellant Dr. Miller, in the City.

At about one o'clock Mrs. Burke's daughter called up Dr. Miller's office on the telephone and mentioned Mrs. Leib's accident and requested him to come to see her. Some one, who said that he was Dr. Miller, answered the call, saying that he could not come at once but promising to come, as requested, after he closed his office. Miss Burke was unacquainted with the doctor and therefore could not identify as his the voice which answered her over the telephone. The doctor not appearing soon, Mrs. Burke, who knew him, called him up over the phone at seven o'clock in the evening and received a reply, which she recognized as being in his voice, promising to come as soon as his office hour was over. He arrived at Mrs. Burke's after nine o'clock and proceeded to make a physical examination of Mrs Leib.

The evidence as to the nature and extent of this examination is conflicting. Of those who witnessed it, Mrs. Burke thought it was brief and casual, her son Wm. B. Burke thought it was pretty thorough, his wife said that the doctor made no other examination than to bare the patient's leg to the hip and pull and twist it and then told her to lie perfectly quiet and rest, that quiet and rest were what she needed. The plaintiff's own account is as follows: "I told him how I suffered; he took my clothing off and examined my foot and did this way and this way (very gently); he examined

it, I suppose, for about ten or fifteen minutes, and then said, you have ruptured a muscle. I said, doctor it hurts me so dreadfully, and he said, you have ruptured a muscle and it is the most intense agony there is, but nothing very serious, and that after a few days it would heal if I would lie quiet. He fixed me and put his hand on the bed and said, lie quiet, you don't need any medicine or attention, but lie quiet." Dr. Miller on the contrary testified that he gave the patient a very careful and thorough examination, stripping, and comparing and measuring her limbs according to the usual methods and moving and handling the injured one as far as desirable and found neither shortening nor eversion of it, and that it was impossible to tell at that time whether the thigh was fractured or not. He said that in either event the proper treatment was that which he prescribed, of keeping the leg quiet and in line. He put a pillow at her foot and told her to keep in position the salt bags which had been put on the outside of her hip before his arrival.

The doctor did not see Mrs. Leib again until Monday evening when he prescribed the use of sand bags to keep her injured leg in a straight position and quiet and also gave her a sedative medicine internally. He came to see her again on Thursday and after re-examining her physically proposed to her to be removed to his sanitarium in Baltimore City at his residence where he said she could receive better attention. She assented to the proposition and on the following day was taken to the sanitarium where she remained under the doctor's care from November 24th to February 21st, when she left it in a lame condition with her fractured femur still ununited. While she was at the sanitarium she was kept in bed in a room with open windows and her leg was held in a position by the use of sand bags. Two efforts were made to treat the leg surgically, first, by the application of a side fixation splint and extension, and afterwards by a plaster cast and extension but she was unable to endure either of them. According to Dr. Miller's uncontradicted testimony her temperature went up to 105 degrees within forty-eight hours

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after the application of the splint and he considered her desperately ill and took off the splint and lightened the extension weight. After her general condition had improved the plaster cast and extension were put on her and retained in position for seventeen or eighteen days, during all of which time she was uncomfortable and constantly begged for their removal and her general condition became so bad that the appliances were taken off. Dr. Miller paid her one visit after she left his sanitarium.

About two weeks thereafter Mrs. Leib called in Dr. Finney, a distinguished surgeon, who performed an operation on her, removing the broken end of the femur and making a new thigh joint. Since recovering from that operation she has enjoyed a fair use of the injured leg, but as it was somewhat shortened by the operation she will always be somewhat lame.

There is much testimony in the record tending to show that Mrs. Leib had been suffering from tuberculosis for some years prior to her accident and that the disease became acute after the accident. She said that Dr. Miller had been her regular physician ever since 1894, and he testified that he had on two occasions attended her for attacks of hemorrhages from the lungs, the last being in December, 1904, when she had a quite severe attack, that when he saw her the second time at Mrs. Burke's after the accident her cough was decidedly worse and her temperature 103, that she had bronchial pneumonia in both lungs when she arrived at his sanitarium and that while she was there he had frequent examinations of her sputum made and found it filled with tubercular bacilli and he was compelled to report her case to the Health Board as tubercular. Miss Ford and Miss Haney, two of the nurses who attended her at the sanitarium, both testified that she told them that she had had consumption for twenty years and that her mother had died of it. The same witnesses testified that she had a very bad cough and profuse expectoration when she came to the sanitarium.

Dr. Miller further testified that at his second visit to Mrs. Leib after her accident he discovered that her femur had

been fractured, but that her general condition was such that he thought it inexpedient to attempt at once to apply splints or a plaster cast to her for the relief of her leg.

As against this evidence Mrs. Leib's family and friends who had known her for some years and who visited her at the sanitarium testified that they regarded her general health, prior to the accident, good, and that her illness at the sanitarium was produced by the cold air and drafts in the room in which she was kept and the insufficient covering on her bed. Some of these witnesses also thought that the doctor had been brusque in manner and indifferent in his treatment of Mrs. Leib and that he displayed lack both of knowledge and skill in that connection failing to ascertain the true nature of her injury or to give her case intelligent or skilful attention.

We express no opinion upon the weight of the evidence in the case, that being a question for the jury. We have referred to portions of it merely as explanatory of our action upon the legal propositions presented by the case.

Twenty-five bills of exceptions appear in the record, the last one of them being to the Court's action on the prayers and the others to rulings on evidence. The first eighteen exceptions concern questions, mostly hypothetical, put to the plaintiff's expert witnesses, who were Dr. J. M. T. Finney and Dr. Wirt A. Duvall. Of those questions only four were put to Dr. Finney, of which three were hypothetical in character. Some of those questions were defective in form but, as the doctor's answers were not such as were calculated to injure the defendant the overruling of the defendant's objection to them did not constitute reversible error.

The general tenor of Dr. Duvall's answers to the hypothetical questions put to him was that a reasonably skilful physician ought to be able to discover, by a reasonably careful examination of a person of Mrs. Leib's age and build, who had suffered such an accident as happened to her, whether or not there was a fractured bone; and that if the examination left him in doubt he should employ the X-ray to clear up the doubt; and that if the presence of a fracture was disclosed the

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patient should be promptly treated either by an operation or by the application of a splint and an extension or a plaster cast to the injured leg and its retention in place for several weeks.

The tenor of the testimony of the defendant's medical experts, Drs. John W. Chambers and Thomas McCrae, and his own testimony as an expert differed from that of the plaintiff's experts chiefly in the important particular of what was the proper treatment to be adopted in cases where the patient with the fractured leg was a lady sixty-one years of age *who had tubercular trouble*. In such cases both Dr. Chambers and Dr. Miller expressed the opinion that a prudent and careful surgeon would look first to the woman's general condition treating the fracture in the meantime in the simplest possible way by the use of pillows and sand bags; and that if, when later on an attempt was made to use splints and extensions or similar appliances on the fractured leg, the patient's temperature rose to 103 or 105 and she suffered from a strenuous cough and expectoration and was uncomfortable, her health should be the first object of care and the appliances removed and the injured limb become a matter of secondary consideration; and Dr. Finney upon cross-examination expressed substantially the same views, although he said that he saw no tubercular symptoms in the plaintiff when he performed the operation on her thigh. Dr. McCrae thought the proper treatment for persons with a fractured hip who also suffered from consumption was to give them an abundance of fresh air, food and generally good hygiene.

The hypothetical questions, by means of which the plaintiff's counsel elicited the expert testimony of Dr. Duvall over the defendant's objection, were predicated upon the assumption that at the time of the accident she was over sixty-one years old and slight in build but were silent as to her general health at the time and especially failed to mention or take into consideration any tubercular trouble on her part. For example, the question referred to in the thirteenth bill of exception was: "Suppose a lady sixty-one years of age, rather

slight, falls and sustains a fracture of the neck of the femur; suppose it were an impacted fracture; what would be the treatment which would be required on the part of a reasonably skilful physician using reasonable care?" The question referred to in the fourteenth bill of exceptions was: "How long usually would reasonable care require that the Hamilton and Long (splint) or the plaster cast and the mild extension should remain before the doctor took it off to examine the condition of the fracture?" The question referred to in the sixteenth exception was: "Suppose a lady sixty-one years of age fell and sustained an intra capsular fracture of the neck of the femur and called in her regular physician, how often would reasonable care require that he should see his patient after his first visit."

We think the defendant's exception to these and all similarly defective questions should have been sustained. Litigants in an action of law are entitled to the judgment of the jury upon all of the facts of the case. Therefore expert testimony on hypothetical questions, which substitutes inferences for facts, ought always to be received with caution. It is of the highest importance in admitting such evidence that care be taken to see that the hypothetical question put to the expert is not only based upon facts already in evidence, but that it is so framed as to fairly represent those facts and not give the situation a false color by the method of their statement. In some jurisdictions such questions are required to cover all undisputed facts material to the subject involved, but it has been held by this Court in several cases that it is not always necessary in framing a hypothetical question to be put to a medical expert to refer to all of the evidence upon the subject. *Williams v. State*, 64 Md. 384; *United Railways v. Seymour*, 92 Md. 431. It has, however, since those cases been held by us that it is faulty in framing a hypothetical question for a medical expert to give a wrong coloring to facts by isolating a particular fact and withholding other facts which bear directly upon the one so segregated. *The Berry Will Case*, 93 Md. 572.

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In that case the objectionable paragraph in the hypothetical question was as follows: "The attack in his last illness took place while he was sitting in his library; he didn't say much, but looked up to the ceiling, saying, yes, yes, um, um, yes, yes, um, um; and his servant being alarmed kept close so that she could reach him, if he attempted to rise, and send for a doctor. At this time the alleged testator said: 'I want to go to my chair;' and the servant said to him, 'you are in your chair;' and he replied to her, 'no I am not.' And she said to him 'do you want to go on the lounge;' and he said: 'yes;' and then she helped him to the lounge and when he got on the lounge he said, 'take me to my lounge.' She said, 'you are there now.' This was the very beginning of his sickness. Assume that the conduct of the alleged testator as just described was caused by the attack, and that he was not aware of the statement made in reference to his lounge and chair as herein mentioned." To this part of the hypothetical question the medical expert replied as follows: "From the description of that attack in your question I would suppose that was an attack of embolism of the brain." Another expert made this answer: "It indicates to my mind that degeneration, the physical and mental degeneration of the individual, caused the formation of an embolism or thrombosis in the brain and that produced an attack of delirium; and his saying yes, yes, yes, and um, um, um, is a characteristic of a man with brain trouble." We held the hypothetical question there to be bad because it entirely excluded the fact which has been testified to by the plaintiff's witnesses that the testator had long been in the habit of saying yes, yes, um, um.

In the present case, although the testimony of Dr. Miller and the two nurses as to the plaintiff's tubercular trouble had not been given when the hypothetical questions were put to Dr. Duvall she had herself testified that when she was at the sanitarium, Dr. Miller, who was her attending physician, had told her that she had tuberculosis so badly that, when she went away from the institution, everything in the room which she occupied would have to be burned. She had also testified

that when she was about to leave the sanitarium her nurse warned her to be careful because she had tuberculosis, but that she (the plaintiff) had heard it before from her niece. She had also admitted having twice been attended by Dr. Miller for attacks of hemorrhage from the lungs prior to the breaking of her hip.

Under these circumstances the entire suppression of the existence of the plaintiff's tubercular trouble in the hypothetical questions to which we have referred, put to her medical expert for the purpose of proving professional ignorance or neglect of the defendant in treating her broken hip and which elicited answers tending to such proof, was improper and the defendant's exceptions thereto should have been sustained. The subsequent testimony as to the serious character of her tuberculous trouble and the important bearing which such a state of health has upon the proper treatment to be adopted with persons in her condition when suffering from fractured bones, emphasizes the importance of requiring hypothetical questions put to medical experts to be so framed as not to give a wrong coloring or undue importance to some of the facts in evidence by the omission or suppression of others.

The nineteenth bill of exception raises the question of the propriety of permitting Mrs. William Burke to testify that Dr. Miller told her over the telephone at one o'clock of the day of Mrs. Leib's accident that he would come out to see her. Mrs. Burke had testified that she did recognize the voice speaking over the 'phone to her as that of Dr. Miller as she did not then know him. At the end of the plaintiff's evidence the defendant moved to strike out this testimony of Mrs. Burke, but his motion was overruled and he excepted to the ruling.

In *The Knickerbocker Ice Co. v. The Gardiner Dairy Co.*, 107 Md. 556, decided at the January Term of this Court, we reviewed at some length the law and the authorities touching the admissibility in evidence of messages received over the telephone from parties whose voice was not recognized by the witness. In holding to be admissible in that case certain tele-

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phone messages from the Ice Company's office, touching the price of ice and the terms on which it would be sold, we cited with approval the statement from the opinion in *Wolff v. Mo. Pac. R. R. Co.*, 97 Mo. 473: "When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews with an unknown clerk in charge of an ordinary shop would be in relation to the business therein carried on." As the communication put in evidence in the present case came over the telephone, in response to a request similarly sent to Dr. Miller's office, and purported to be from him, and was not strictly personal or medical in its nature but consisted merely of an alleged statement on the doctor's part that he was unable to respond at once, to a request to visit a patient, accompanied by a promise to do so after he had closed his office, we think it was properly permitted to go to the jury to be considered by them in connection with his testimony that he got there as soon as he could after receiving a telephone request to come, which according to his account reached him about six or seven o'clock in the evening.

The other bills of exception to evidence rest upon the ground that certain testimony on behalf of the plaintiff was improperly admitted in rebuttal because it should have been offered, if at all, in chief. We have repeatedly decided that the mere order of proof and the circumstances under which evidence should be admitted or rejected when offered out of proper order is, in the absence of any rule of Court upon the subject, in the discretion of the trial judge as the tribunal best qualified to determine what the justice of the case may require and that his rulings on such subjects will not be reviewed by us. *Ridgely v. State*, 75 Md. 515-516; *C. & P. R. R. Co. v. Slack*, 45 Md. 176; *Bannon v. Warfield*, 42 Md. 39.

At the close of the case the plaintiff offered five prayers of which the Court granted the first three and refused the

fourth and fifth. The defendant offered ten prayers of which the Court granted the first and seventh as offered and the fourth and sixth as modified and rejected the others.

We have several times passed upon the degree of care and skill required of attending physicians or surgeons toward their patients. In *State, use of Janney, v. Housekeeper*, 70 Md. 171, we used the following language: "It was the duty of the professional man to exercise ordinary care and skill, and this being a duty imposed by law, it will be presumed that the operation was carefully and skilfully performed; in the absence of proof to the contrary. As all persons are presumed to have duly performed any duty imposed on them, negligence cannot be presumed but must be affirmatively proved. *Best on Presumptions*, page 68; *Railroad v. Chappell*, 21 Fla. 175. This principle is especially applicable in suits against physicians and surgeons for injuries sustained by reason of alleged unskilful and careless treatment. The burden of proof is on the plaintiff to show a want of proper knowledge and skill."

In *Dashiell v. Griffith*, 84 Md. 380, we again said upon the same subject: "The law is settled in numerous well-considered cases, that a physician or surgeon who holds himself out to the world to practice his profession, by so doing impliedly contracts with those who employ him that he possesses a reasonable degree of care, skill and learning, and he is therefore bound to exercise and is liable for the want of, reasonable care, skill and diligence, and he is responsible in damages arising as well from want of skill as from neglect in the application of skill. * * * The cases are generally agreed upon the proposition, that the amount of care, skill and diligence required is not the highest or greatest, but only such as is ordinarily exercised by others in the profession generally."

The law as announced in the foregoing cases is substantially embodied in the defendant's first, third and fourth prayers as granted by the Court in the present case, and there was therefore no error in granting those prayers.

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The plaintiff's first prayer in effect instructs the jury that if they found that the plaintiff sustained the fracture of her femur and that the defendant was a physician and surgeon, and as such undertook to treat her and did not exercise reasonable care and skill in ascertaining from what she was suffering or in his treatment of her case, and that by reason of such failure on his part she suffered pain and lost the use of her limb, she was entitled to a verdict in her favor. This prayer made no reference to the evidence in the case tending to show a tuberculous condition of the plaintiff at and after the time of the accident and the effect of such a condition upon the propriety of the treatment of the plaintiff's case adopted by the defendant, but the Court granted the prayer in connection with the plaintiff's third prayer, by which, as modified by the Court, the jury were directed not to allow any damages on account of the treatment given to her by the defendant for tuberculosis, nor for such delay in his treatment of her hip as resulted from his diagnosis of tuberculosis in her. We find no reversible error in the granting of the two prayers in connection, thus limiting the first by the proviso contained in the third.

The plaintiff's second prayer, which was granted generally, was an amplification of the first prayer, but was predicated especially upon the finding by the jury of the commission by the defendant of certain specified mistakes in the diagnosis of the plaintiff's condition and want of care and skill in specified respects in the treatment of her case. This prayer also was entirely silent as to the important evidence touching a tuberculous condition of the plaintiff, and had therefore the practical effect of withdrawing from the consideration of the jury the evidence reflecting upon facts not mentioned in the prayer, which if believed by them would have defeated the plaintiff's right of recovery. A plaintiff's prayers need not negative every theory of defense finding support in the evidence, but prayers asserting a plaintiff's right to recover upon the finding by the jury of certain facts, which if standing alone would justify a verdict in his

favor, but ignoring the evidence tending to establish other and inconsistent facts, have been repeatedly held by this Court to be misleading and erroneous. *Corbett v. Woolford*, 84 Md. 428; *Bank of Bristol v. B. & O. R. R.*, 99 Md. 682; *Haines v. Epplly & Pearce*, 41 Md. 234; *Kennedy v. Co. Commrs.*, 69 Md. 71; *Adams v. Capron*, 21 Md. 205; *B. & O. R. R. v. Shipley*, 31 Md. 370-71.

There was no error in rejecting the defendant's second and fifth prayers, which merely consist of the statement from a different standpoint of propositions of law covered by the granted prayers. Nor was there any error in rejecting the defendant's eighth, ninth and tenth prayers, which sought to take the case from the jury for want of legally sufficient evidence to entitle the plaintiff to recover. We cannot say that there is no evidence in the record tending to support the plaintiff's case which if believed by the jury would be legally sufficient to be entitled to their consideration in arriving at a verdict.

For the error of the Court below in overruling the defendant's objections to the hypothetical questions put to Dr. Duvall and his answers thereto, which we regard as material and tending to prejudice the defendant's case, and the error in granting the plaintiff's second prayer, the judgment appealed from must be reversed and the case remanded for a new trial.

Judgment reversed with costs and cause remanded for new trial.

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GOTTLIEB-KNABE & COMPANY ET AL. vs. CHARLES
F. MACKLIN ET AL.

*Right of Municipality to Rent Property Not Needed for Public
Use—Use of Rented Municipal Property in Competi-
tion With Business of Taxpayer.*

When a municipality owns real property not needed for public use, it is not obliged to keep the same unoccupied, but may rent it temporarily to private persons. The fact that a lessee uses such property in competition with the business of a taxpayer, does not entitle the latter to an injunction, when the renting is not *ultra vires*.

The Mayor and City Council of Baltimore rented an unused building owned by it to the Field Officers of a regiment of State Militia for use as an armory for a definite term. These officers, with the consent of the municipality, sublet the building from time to time to private persons for concerts and other meetings. The proceeds from these lettings were divided between the municipality and the regiment. The charter of the city authorizes it to hold and dispose of property, and to rent for limited terms, any of its property not needed for public purposes. Plaintiffs' bill in this case alleged that they are the owners of halls, used for concerts and public meetings; that the renting of the armory by the Field Officers for such purposes deprived plaintiffs of the opportunity to rent their buildings for those purposes, and that such use of the municipal property was unlawful, and the bill prayed for an injunction. *Held*, that the city has the power under its charter to rent the building to the Field Officers, since it was not needed for municipal purposes; that the letting of it for entertainments was a renting for a definite term within the meaning of the charter, and that the Field Officers as lessees had the right to sublet the building for these purposes.

Held, further, that such use of the armory in competition with the business of plaintiff does not deprive them of their property without due process of law.

Decided January 13th, 1909.

Appeal from the Circuit Court of Baltimore City (ELLIOTT, J.)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

William L. Marbury and *Carroll T. Bond*, for the appellants.

Albert S. Gill and *John Philip Hill*, for the appellees.

PEARCE, J., delivered the opinion of the Court.

The Mayor and City Council of Baltimore owns a lot of ground on Fayette Street in said city, improved by a building constructed and used for a number of years, as the Western Female High School of said city, but in 1896 its use for this purpose was abandoned, and during the same year the Mayor and City Council, through its then Comptroller, Charles D. Fenhagen, acting under Ordinance No. 155 of said Mayor and City Council, leased said lot and building to certain persons then constituting the Field Officers of the Fourth Regiment Infantry, Maryland National Guard, and their successors in office, "for the purpose of an armory for said regiment, for the term of five years, from March 11th, 1896, for the sum of one dollar per annum rent," and in further consideration of the performance of certain covenants contained in said lease, as to which covenants no question arises. The successors of the Field Officers named in said lease are the defendants in this case, the present Field Officers, other than the Mayor and City Council, and are lessees holding over under said lease.

The plaintiffs, Gottlieb-Knabe Company of Baltimore City,

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and Germania Mænnerchor of Baltimore City, are both private corporations under the laws of Maryland, owning and maintaining buildings rented by them for profit, for concerts, exhibitions, entertainments and public meetings; are both substantial taxpayers in said city, the first-named plaintiff being the owner of the building on Mount Royal Avenue known as "The Lyric," and the latter being the owner of a large building and hall on West Lombard Street, in said city, both of which buildings have been long used for the above-mentioned purposes. The bill charges that the "present Field Officers by and with the consent and concurrence of the Mayor and City Council, for the purpose of providing money for the said Fourth Regiment, in addition to that appropriated by the State, in maintaining that branch of the militia, and for adding to the revenues of the city, have entered into contracts for the rental of said armory building for concerts, meetings and other gatherings by organizations of private citizens desiring such use of said building, and have heretofore actually rented said building for said purposes, and have entered into contracts for still further rentals of that character, in the months of October, November and December, 1907, and January, 1908, under an agreement that part of said rentals shall be paid to said Field Officers, and part to the Mayor and City Council."

The bill further charges that still other contracts of like character are being sought by other organizations, none of which have any connection with any branch of the State Militia, or with the municipality of Baltimore, but are exclusively devoted to private purposes, and intend to devote said armory, when so rented to them, exclusively to concerts, entertainments, etc., for the private profit of said organizations.

The bill further charges that such use of said armory is an unauthorized and unlawful use of the property of the taxpayers, and endangers the said property and the equipment and personal property of the State for which said building is provided as a storehouse; that such rentals for such private purposes deprive the plaintiffs and others owning like prop-

erty of opportunity to rent their buildings for similar purposes and of deriving from them income which would otherwise be assured, and if allowed will deprive the plaintiffs of profitable customers of long standing—one of which, "The Harmonie Singing Society," is now advertising numerous entertainments to be held in said armory; that it is impossible for plaintiffs and others in like situation to enter into competition with said defendants, they being exempt from all taxes and cost of maintenance, while plaintiffs are not only subjected to these charges upon their properties, but are compelled as taxpayers to bear their proportion of what is devoted to the maintenance of said armory; that protest against this alleged injustice has been made to the Governor of the State, by whom said protest was referred to the Adjutant-General of the State, who has replied that he is without power to act in the premises.

The prayer of the bill is for an injunction restraining the defendants, their agents and officers, and their successors in office, from letting or renting the said armory, or any part thereof, for the use of meetings, concerts, exhibitions or entertainments, to any person or persons, organization or organizations, other than the officers or organizations of the Militia of the State of Maryland, and for such other and further relief as their case may require.

A preliminary injunction was issued, and both defendants demurred to the bill on the ground that no case was stated therein entitling either plaintiff to relief in equity, and on the hearing the demurrer was sustained, the injunction was dissolved and the bill of complaint dismissed.

This case has been argued by all the counsel with much ability, and by the distinguished counsel for the appellants with unusual fullness and earnestness. If the matter could be reduced to a question of *public policy* properly determinable by this Court, our conclusion might, perhaps, be different, though we are not to be understood as so stating. The inquiry, however, is one of *power*, and it is not claimed that

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the renting complained of can be restrained unless the act is *ultra vires*.

After a careful examination and consideration of the briefs in the case we think the questions necessary for determination may be reduced to two:

- 1st. Had the city the right to rent this building as it did?
- 2nd. If it had such right, what is there, if anything, in the character of the Field Officers, as lessees, to affect their power of subletting *in the manner, and for the purposes, which they have been, and are, doing?*

1st—By section 1, of Article 4, Public Local Laws—City Code—the Mayor and City Council are expressly authorized “to purchase and hold real, personal and mixed property, and *dispose* of the same for the benefit of the city as hereinafter provided.”

By section 13 of the same Article it is declared: “Nothing contained in this Article shall prevent the Mayor and City Council of Baltimore from disposing of any building or parcel of land no longer needed for public use; provided that such disposition shall be approved of by the Finance Commissioners by their uniting in the conveyance thereof, and shall be made at public sale and be provided for by ordinance; nor from the renting for fixed and limited terms of any of its property not needed for public purposes, on approval of the Commissioners of Finance.”

Under this section, absolute disposal must be provided for by ordinance, and must be at public sale, and the Finance Commissioners must unite in the conveyance as the evidence of their approval. There is no limitation upon the power of renting for fixed and limited terms, except the approval of the Finance Commissioners, the mode of approval not being specified. The lease to the Field Officers in this case, however, recites the fact that it was made in pursuance of Ordinance No. 155 of the Mayor and City Council, *approved* May 12th, 1893, so that it appears to have been made in accord with the strictest construction of section 13 of Article 4.

In *Davidson v. Mayor and City Council*, 96 Md. 509,

under an ordinance of the Mayor and City Council of Baltimore, a lot was acquired and a building erected thereon for the use of English-German School No. 1, and it was so used for a number of years, when the Board of School Commissioners of the City determined to use it for a colored high school, which change of use certain taxpayers of the city sought to restrain by injunction. In refusing the injunction on appeal this Court referring to section 1 of the City Charter, *supra*, said: "By the first and second sections of that instrument all the property of the city is vested in them with full power of disposition of it in the manner and terms therein provided. Under the lease the Mayor and City Council became the owner of the premises, and by reason thereof had full power to designate from time to time the uses to which it could be put. * * * The terms of the charter, and the Acts of Assembly, if there were any, determine what should be the measure of their power and duty. * * * It could not have been intended that for all time the premises could be used only for the uses of that school. If it could be available for no other use than that specifically mentioned, it could well happen that after the location had ceased to be available for the specified use, and there was no power in the corporation to designate any other employment of the premises, the property would remain idle and worthless, and become a mere incumbrance on the city." This case is cited to show the broad and emphatic language used in considering the power of the city to determine the uses to which its property of that description can be put, though the case did not involve the precise questions here presented, of property no longer needed for public uses. But, as we shall see later, there are abundant authorities from other Courts of high repute sustaining the lease to the Field Officers in this case.

We have not overlooked, though we cannot agree with the ingenious argument of the appellants, by which they seek to take this case out of the operation of section 13 of the Charter. They contend that "letting" for entertainments for one or more evenings, however definitely ascertained, is

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not a "renting for a fixed and limited term." We think it is apparent that the meaning and purpose of the requirement that the renting allowed should be for a fixed and limited term—and with the approval of the Finance Commissioners—was that no such indefinite or renewable contracts should be made as would interfere with the probability of an early *absolute* disposal of unused property of the city, no argument being required to show that when real property, or buildings belonging to the city are no longer available for its public uses, the financial interests of the city demand that the cost of maintenance be gotten rid of as promptly as possible by absolute sale; and we are of opinion that the term "renting" as here used embraces the power to let or hire the use for a single evening or any number of evenings—whether consecutive or not. A liberal construction of such a charter power is required to enable the city, in the interest of its general taxpayers, to minimize the loss of revenue upon its unused property.

Again the appellants contend that this building is not "property not needed for public use," as those words are used in section 13, because it is as they say, "in the custody and regular use of a branch of the government as its only habitation." But why is it in such use and custody? Clearly only because the city *its owner* does not need it for any of its *own public uses*. Can it be supposed that if the city could adapt it to any substantial and valuable public use of the municipality, it would so recklessly neglect its duty to the taxpayers as to rent it to the Field Officers as they did for one dollar a year and a covenant to maintain an insurance for \$10,000? The question answers itself, and must satisfy anyone who will consider it impartially, that it is *now*, notwithstanding its occupancy under the terms of this lease, as clearly unused property so far as the city is concerned, as it was before this lease was made.

Referring now to the authorities which we have said are abundant to sustain this lease, we cite the following:

In *French v. Quincy*, 3 Allen. 9, the town erected a town

hall on a lot held under a deed conveying the title for that specific use, with condition for reverter to the grantor or his heirs on breach of condition as to use. The building was so constructed as to contain in the first story a bank, a clothing store, and a lockup, and in the second story a hall for town meetings, also used as a theatre and for entertainments and dances. Upon a writ of re-entry, it was held that the town having authority to construct the building, and not having occasion to use parts of it for the time being, is not obliged to keep them unoccupied but may derive a revenue from them by renting them—notwithstanding this interfered with the business of the plaintiff's tavern.

In *Bates v. Bassett*, 60 Vermont, 531, the town owed an old hall not used or needed for any town purposes. Being dilapidated, it was repaired at a cost of \$2,500, and the apartments rented for various purposes. The Court said: "The town had no right, as a *primary purpose* to erect a building to rent, but if in the erection of a hall for its proper municipal purposes, it conceives that it will lighten its burdens to rent part of its building whereby an income is gained, no sound reason is suggested why it may not do so."

In *Stone v. Ocomowoc*, 71 Wis. 155, plaintiff, who was a large taxpayer and owned a hall in the city used for lectures, theatrical performances, dances, etc., sought to restrain the city from leasing its auditorium for the same purposes. The Charter gave the city power to purchase and hold for use of the city any estate, real or personal, and to sell, lease and convey the same, and to control and manage any other property of the city. The relief was refused, the Court holding the injury to the plaintiff to be too remote and consequential to be the basis of an action, and hence *damnum absque injuria*.

In *Bell v. Plattville*, 71 Wis. 139, where a similar question was decided in the same way, the Court quoted with approval the language of LORD CHANCELLOR SELBORNE in *Attorney-General v. Great East. R. W. Co.*, L. R. 5 App. Cases, 473, in which he said: "The doctrine of *ultra vires*

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ought to be reasonably and not unreasonably understood and applied, and that whatever may be fairly regarded as incidental to, or consequential upon those things which the Legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*." And in the same case the Wisconsin Court took occasion to say (referring to the cases of school districts so much relied on by the appellants in the case now before us): "The cases relating to powers of school districts cannot be regarded as an authority for limiting the powers of cities as claimed, since their powers are very much more restricted, being at most *quasi* corporations—or corporations *sub modo* only." The same view has been held in the Federal Court, in *The Maggie P.*, 25 Fed. Rep. 203. In that case the city of St. Louis, through its harbor master pumped out a sunken steamer, under a contract with the owner, and filed a libel for these services. The vessel owner raised the question whether the making of such a contract by the city was not outside the scope of municipal power. The Court through Mr. Justice BREWER sustained the libel, after careful consideration, saying: "When a city has in its possession instrumentalities, and hires employees for the purpose of discharging some public duty, I see no reason why, when the exigencies of public duties do not require the use of those instrumentalities and employees, it may not make a valid contract to use them in some private service." This is the exact principle announced by JUDGE BARTOL in *Rittenhouse v. Balto.*, 25 Md. 336, in which he says: "Where the corporation appears in the character of a mere property holder, and enters into a contract with reference to such property, as any private citizen or other proprietor might do, or where it engages in an enterprise, not necessarily connected with, or growing out of its public capacity, as a part of the local government, then all its rights and liabilities are to be measured and determined by the same rules as govern mere individual persons or private corporations." The Court, also in the same case, laid down the doctrine repeated and emphasized in *St. Mary's Indus. School*

v. *Brown*, 45 Md. 326, and *Davidson v. Baltimore City*, 96 Md. 513, that the taxpayer cannot invoke the restraining power of a Court of Equity, unless it be shown that the municipal corporation and its officers are acting *ultra vires*, and where such unauthorized acts may affect injuriously the rights and property of the parties complaining. Many other cases to like effect might be cited, but they may be found collected in 20 *Enc. Law*, 2nd Ed., 1187 and notes.

Before passing from this branch of the case we will refer briefly to three cases principally relied on by the appellants in opposition to the views we have expressed and the cases we have cited, but which we regard as in no way impairing the authority of the latter.

In *Alleghany Co. v. Parrish*, 93 Va. 619, the Code authorized purchase of land for the erection of a Court House, Clerk's Office and jail, and required *the residue* to be planted in trees and *kept as a place for meeting of the people*. The county Court let to Parrish a part of the Court House grounds for the erection of a law office, but afterwards brought suit in ejectment to compel its removal. Parrish filed a bill in equity to quiet title, and the bill was dismissed on demurrer. It is obvious that here the use of the property, outside of the prescribed buildings, was irrevocably fixed by the Code until altered by the Legislature. There was no property unused, or not needed for the public use to which it was dedicated, and consequently it was beyond the power of the county to override the legislative mandate that the whole residue be kept for a meeting place for the people.

In *Nerlein v. Village of Broton*, 94 Minn. 361, a taxpayer and dealer in flour, feed and grain, sought to restrain the use of the town hall for a similar business, and was granted the relief sought. The facts developed were that the town hall was in use as such; that one Bohmer was President of the Village Council, and that the whole of the space in the building was not actually necessary for public use; that Bohmer for four years had been engaged in retailing flour at the hall in competition with the plaintiff, but without paying or agree-

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ing to pay anything for the use of the hall, and there was evidence that the plaintiff's business had been damaged by this competition. It was also shown that the village bailiff acted as clerk for Bohmer and conducted the business. The Court found that the members of the Council knew of, and permitted the conduct of, the business, and that they were thus derelict in their duty in permitting their President to prostitute his office by diverting the public property from its public use—exclusively to his own private gain. The element of fraud which permeated the case not only justified, but required the granting of the injunction.

In *Sugar v. Monroe and Tom Stewart and Co.*, 108 La. 677, the plaintiffs were taxpayers, and owners and licensees of an opera house in Monroe, and sought an injunction to restrain the city from using its municipal school building as a theatre. A bond issue had been voted for the erection of certain improvements, including \$20,000 for a school building. The city added \$50,000 raised in some other manner and built a fine house. Upon its completion, the city, under cover of a pretended lease to the janitor of the school, undertook to use the auditorium as a theatre. The Court said: "The so-called lease is a flimsy contrivance which deserves but little notice. The firm of Tom Stewart and Co. had no existence when the lease was signed, and we think has none now. Tom Stewart had been plaintiff's property manager at their theatre, and was later made janitor of the school; but the entire management of the auditorium, as a theatre, was in the Chairman of the Committee of the City Finances." The Court also said: "The case was not materially different from what it would have been if the Mayor and City Council had originally proposed to devote the \$20,000, voted for a school building, to the construction of a theatre and had been enjoined from so doing." Referring to *Warden v. New Bedford*, 131 Mass. 23, in which it was held "that while a city could not erect a building for business purposes, but having a city hall built in good faith and used for municipal purposes, it has a right to allow it to be used incidentally for

other purposes, either gratuitously or for compensation," the Court, in the Louisiana case above, adds: "We find no reason to dissent from the views thus expressed and have little doubt they were appropriate to the case decided. We do not wish to be understood as going to the extreme of holding that the city authorities may not make such casual and incidental use of the building in question, not inconsistent with, or prejudicial to, the main purpose of its erection, as they may deem advisable, *nor as holding that changed conditions in the future may not justify them in devoting it to some other purpose.*"

It having been shown that in making the lease now under consideration the city acted as a mere property holder, and entered into the contract with reference to the demised property, as any private proprietor might do, it follows that the doctrine of *ultra vires* cannot be invoked unless it has in some way been imported into the case by the subsequent concurrent action of the Mayor and City Council and the Field Officers in permitting the use of the armory for such engagements as have been already described—for the joint financial benefit of the city and the Field Officers, one-third to the city and the residue to the Field Officers.

We have read and considered with care the elaborate argument of the appellants covering twenty-six pages of their brief, relating to the organization of the Militia of the State and the powers and rights of the Field Officers in this case, and it is doubtless true, as contended, that they are mere governmental agencies, without corporate organization or powers; but we cannot perceive that this is at all material to be considered. Indeed, it would seem to follow from that fact that all power over that property, not capable of exercise by the Field Officers, remains unimpaired in the city. The armory has not ceased to be the unused property of the city, because the State has appropriated money to fit it up, and maintain it as an armory during its occupancy as such under the lease. It may be, though it is not necessary so to decide, that the Field Officers alone, under the lease, could not, against the will, or without the consent of the city, authorize

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its use in the manner now under consideration. But they certainly control its use *as an armory*, and the city as certainly owns the reversion in the property, together with all control over its use which has not by that lease been vested in the Field Officers, and when the city and the Field Officers, together representing the absolute ownership and unqualified control of the property, consent and agree, as the record shows they have done, to this extended use of the property, for a further valuable consideration, equitably apportioned between them by their own agreement, we can perceive no defect of power to carry such agreement into execution, and it ought not in our judgment to be denied upon any mere technical ground, or any refinement of reasoning, however skilful. This is not like the case of the *Veterans 7th Regiment v. Field Officers 7th Regiment*, 38 N. Y. State Reporter, 48, cited by the appellants, where the Veterans sought to quiet their title to a part of the armory let to them by the Field Officers by debarring the latter from repudiating their lease and reasserting their former title. It is certainly immaterial to these plaintiffs, if the lease to the Field Officers was a valid lease, whether the powers thereby granted are, or are not, extended by a subsequent valid agreement.

But the appellants still further contend that the hiring out of the public property for such entertainments as the record shows is an unconstitutional invasion of the rights of citizens engaging their property in that business, in that it is a deprivation of liberty and property without due process of law, and they have specially requested us to express an opinion upon this branch of the argument. This is not the case of a municipal corporation perverting the functions of government by deliberately and indefinitely engaging in business for profit, and entering into competition with its taxpayers from whom it exacts a license which it does not itself pay. It is but the temporary, casual and incidental use of unused public property, done in the practice of a public economy to avoid loss of revenue upon such unused public property, and to lighten thereby the general burden of taxation. Such being

in our view the case before us, we cannot sustain the constitutional objections of the appellants.

Decree affirmed with costs to the appellees above and below.

THE UNITED RAILWAYS AND ELECTRIC COMPANY *vs.* ROSE CORBIN.

Medical Experts—Evidence of Opinion as to Cause of Plaintiff's Injury—Opinion as to Mental Condition of Injured Person—Exception to Testimony Not Waived by Cross-Examination of Witness—Shock to Plaintiff from Falling of Trolley Wire in Street—Sufficiency of Evidence—Instructions—Special Exception to Competency of Expert Witness Not Necessary.

When the question at issue is whether the plaintiff's injury was the result of contact with a wire charged with electricity or whether it was the result of having been frightened by a flash from such wire, plaintiff's physician having testified that she was suffering from hysteria, produced by a shock or injury and not by disease, a medical witness, not qualified to testify as an electrical expert, or as a medical expert acquainted with the effects of electric currents, cannot be allowed to testify that in his opinion the condition of the plaintiff was more probably the result of an electric shock than the result of a nervous shock from mere fright.

A medical witness ought not to be allowed to testify that the nervous condition of the plaintiff, alleged to have been caused by defendant's negligence, is such that it would not be proper for her to marry, since his opinion, based entirely on plaintiff's nervous condition, must needs be more or less speculative.

A physician of some years' experience as a practitioner, but who is not an alienist or specialist in mental diseases, who attended

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plaintiff when she received the injury complained of and afterwards, is entitled to testify as to his opinion of the ultimate effect of the injury upon her mind.

An exception taken to the admission of certain evidence when offered is not waived by the exceptant's afterwards cross-examining the witness as to such evidence.

A physician who testifies that he had had two electrical shocks himself and had had three patients suffering from such shocks, may be asked whether in his opinion the condition of the plaintiff, when he examined her, was such as might probably have been produced by an electric shock.

A witness who is qualified only as an expert as to the effects of electricity on the human body cannot testify as to whether a person can receive an electric shock from a wire which did not touch his person or clothing.

Plaintiff's evidence was that while walking in the street on which defendant's electric railway ran, the trolley of a car came off, and kept bumping against the span wires stretched across the street to hold up the trolley wire; that thereby a span wire was detached from its fastening to the pole, fell over the trolley wire, thus becoming charged with electricity; that there was a flash from the wire in plaintiff's face, and that she became unconscious and would have fallen but for help; that afterwards plaintiff developed certain symptoms of injury. It was shown that plaintiff might have received an electric shock through her clothing which would not have left a mark on her body. Defendant's evidence was to the effect that the wire did not touch plaintiff. *Held*, that the evidence is legally sufficient to show that either the plaintiff's person or clothing was touched by the wire, and to take the case to the jury.

Held, further that if the bumping of the trolley wire against the span wire caused the latter to be torn from the pole, that is some evidence that it was not properly fastened.

Held, further, that if the hysterical condition of the plaintiff was not caused by the accident there is evidence in the case that other injuries were caused by it for which she is entitled to recover.

In an action to recover damages for an injury alleged to have

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been caused by defendant's negligence, a prayer is erroneous which instructs the jury that if they believe the accident happened as described by the witness, G. P., then the verdict must be for the defendant.

Upon Motion for Re-Argument.

When objection is made to a question propounded to a medical witness which is overruled and the question answered, the admissibility of the evidence may be determined upon appeal not only upon a consideration of the character of the evidence, but also upon the ground that the witness was not shown to be qualified as an expert to answer the question, although no special objection was made at the trial that he was not competent to testify as an expert.

Decided January 12th, 1909.

Opinion upon motion for re-argument, March 23rd, 1909.

Appeal from the Court of Common Pleas of Baltimore City (HARLAN, C. J.), where there was a judgment on verdict for the plaintiff for \$5,000.

Plaintiff's 1st Prayer.—The Court instructs the jury that it was the duty of the defendant to exercise reasonable care, in view of the danger to be reasonably apprehended from a failure to do so, in the construction and maintenance of its overhead wires and in the operation of its cars, in order to avoid injuring persons lawfully using the public streets; and if the jury find that one of the defendant's overhead wires broke and fell because of the failure of the defendant or its servant to exercise such reasonable care and that such wire was charged with electricity, and that it came in contact with the plaintiff's person or clothing and gave her an electric shock which rendered her unconscious and caused her serious injury, and that at the time the plaintiff was lawfully using a public street of Baltimore and was exercising reasonable

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care, then the verdict of the jury should be for the plaintiff. (*Granted.*)

Defendant's 4th Prayer.—The jury are instructed that there is no evidence in this case legally sufficient to show that the wire mentioned in the testimony owned by and under the control of the defendant did, by and through the negligence and carelessness of the defendant's agents and servants, fall down in the way of the plaintiff at Howard and Lexington Streets, and therefore under the pleadings the verdict of the jury must be for the defendant. (*Refused.*)

Defendant's 5th Prayer.—That the uncontradicted evidence shows that the plaintiff was guilty of negligence directly contributing to the happening of the accident mentioned in the testimony, and therefore the verdict of the jury must be for the defendant. (*Refused.*)

Defendant's 6th Prayer.—The jury are instructed that if they believe from the evidence that the plaintiff could have avoided the happening of the accident by the use of ordinary care and caution on her part, then the verdict of the jury must be for the defendant. (*Granted.*)

Defendant's 7th Prayer.—The jury are instructed that there is no evidence in this case legally sufficient to show that the wire which fell as described in the plaintiff's testimony, at the corner of Howard and Lexington Streets, touched the plaintiff's person or clothing at all, and if the jury find that the plaintiff sustained no physical injury from said wire, but merely encountered peril, which caused fright and consequent mental suffering, then she is not entitled to recover, and their verdict must be for the defendant. (*Refused.*)

Defendant's 8th Prayer.—That the uncontradicted evidence shows that the defendant's agents and servants were not guilty of any act of negligence, either in the operation and management of the car mentioned in the testimony, or in the construction, maintenance or operation of the overhead wires at the point mentioned in the testimony, and therefore the verdict of the jury must be for the defendant. (*Refused.*)

Defendant's 9th Prayer.—The jury are instructed that the burden of proof is upon the plaintiff to show that the injuries complained of were caused by the want of ordinary care on the part of the agents and servants of the defendant company, and unless the jury shall be satisfied by the weight of the evidence that the injuries complained of were caused by the want of ordinary care on the part of defendant's agents, the plaintiff is not entitled to recover and the verdict of the jury must be for the defendant. (*Granted.*)

Defendant's 10th Prayer.—The burden of establishing by a preponderance of proof, satisfactory to the jury, the state of facts alleged in the declaration, rests upon the plaintiff; and if the testimony in this case should be such as to leave the minds of the jury in a state of even balance as to the truth of the facts alleged in the declaration, the verdict must be for the defendant. (*Refused.*)

Defendant's 11th Prayer.—That, even though they shall find from the evidence that there was a defect in the trolley pole or the overhead wires of the defendant company at the point of the accident, and if they shall further find that the injury was caused solely by such defect, still their verdict must be for the defendant, unless they shall find from the evidence that the defendant could have discovered the defect by a reasonable and proper examination and that the defendant failed to make such examination and that thereby injury was caused to the plaintiff. (*Granted.*)

Defendant's 12th Prayer.—The jury are instructed that the law does not make the defendant company an insurer of the safety of pedestrians on the street, nor does it require the company to adopt every possible contrivance looking to their safety that human ingenuity can suggest, and that if they find from the evidence that the defendant had, in reference to both the erection and maintenance of the wires and equipment mentioned in the testimony, used every reasonable safeguard which the nature of its business admitted, then it has performed its whole duty in the premises, and under the plead

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ings in this case the verdict must be for the defendant. (*Granted.*)

Defendant's 16th Prayer.—If the jury believe from the testimony that the hysterical condition described by the plaintiff and the plaintiff's witnesses in this case was not caused by the accident mentioned in the testimony, but was caused by other troubles from which the plaintiff was suffering prior to the time of the accident, then there is no evidence from which the jury can find that said accident caused any injury to the plaintiff, and the verdict of the jury must be for the defendant. (*Refused.*)

Defendant's 17th Prayer.—The jury are instructed that if the jury believe from the testimony in this case that the falling wire mentioned in the evidence did not strike the person or clothing of the plaintiff, and shall further find from the evidence that the plaintiff could not have received an electric shock, unless the said wire did come in contact with her person or clothing, and shall further find that if the plaintiff received no injuries whatsoever as the result of fright occasioned by the electric sparks mentioned in the testimony, then the plaintiff is not entitled to recover any damages as the consequence of the fright, and the verdict of the jury must be for the defendant. (*Granted.*)

Defendant's 20th Prayer.—If the jury believe that the plaintiff received no bodily injuries from contact with the electric current emanating from the broken wire mentioned in evidence, and that the flash and noise produced by such current so escaping from the broken wire would not have affected injuriously a person of ordinary physical and nervous strength in the position of the plaintiff at the time of the accident, then the plaintiff is not entitled to recover. (*Granted.*)

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

Joseph C. France and J. Pembroke Thom (with whom was Albert R. Stuart on the brief), for the appellant.

S. S. Field (with whom was *Philip M. Golden* on the brief), for the appellee.

BOYD, C. J., delivered the opinion of the Court.

This is an appeal from a judgment rendered in favor of the appellee against the appellant for injuries alleged to have been sustained by her on Howard Street in the City of Baltimore, through the negligence of the defendant. The narrative alleges that by and through the negligence and carelessness of the defendant one of its wires, charged with electricity, "fell down in said plaintiff's way on said Howard Street from its elevated and proper position and came in contact with the plaintiff and gave her an electric shock, and while it was falling towards said plaintiff said wire was discharging great sparks of electricity, and as a result of the falling of said wire, as aforesaid, which was caused by the negligence of said defendant, its agents and servants, the said plaintiff was placed in a perilous position, and in her efforts to extricate herself from said dangerous position, and to get out of the path of said falling and electric light wire, the plaintiff was seriously and permanently injured and damaged to her nervous system and she was injured about her body and otherwise," etc. The wire which dropped into the street is what is called a span-wire and was stretched across the street to hold up the wire on which the trolley runs. It was in some way pulled out of the ring which holds it to the pole and it fell over the trolley wire, thereby becoming charged with electricity. The plaintiff contended that coming in contact with the wire caused the injuries, while the theory of the defendant was that so far as she sustained any injuries they were the result of fright and not from contact with the wire. The evidence on the part of the plaintiff was to the effect that she was left in a very serious nervous condition, became unconscious at times, suffered from convulsions, etc. Her physicians testified that she was suffering from "traumatic hysteria"—which was described by them to be hysteria produced by shock or injury, as distinguished from that caused by disease.

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Ten exceptions were taken to the rulings of the Court on the evidence, and the eleventh embraces the rulings on the prayers. The Court granted the two prayers offered by the plaintiff, and the sixth, ninth, eleventh, twelfth, thirteenth, seventeenth, eighteenth, nineteenth and twentieth offered by defendant, and rejected its first, second, third, fourth, fifth, seventh, eighth, tenth, fourteenth, fifteenth and sixteenth, and overruled its special exception to the plaintiff's first.

The first, second and third exceptions can be considered together. Dr. Baum had testified that from the history of the case he had received he concluded that "the results of this case were the results of a shock." He was then asked: "When you say from your examination of the case you diagnosed it as traumatic hysteria or nervous condition produced by shock what kind of a shock do you mean?" To which he replied: "Well from the history I elicited it was rather an electric shock or fright." Perhaps the word "rather" in the record was intended to be "either." He was then asked: "Tell the jury whether or not her condition could have been produced by fright merely without receiving an electric shock, or by the electric shock, if you say it could have been produced by either; tell them which, in your judgment, was the most probable cause of it." That question was objected to, but the Court overruled the objection, and the witness answered: "It is probable for either to have caused it; it is possible for an electric shock to have caused it; it is my opinion that an electric shock would have caused her condition." That ruling is presented by the first exception.

His testimony then proceeded: "You have said either of them could; it is possible either of them could? A. Yes, sir. Q. Are you able to say as a physician, from her condition as you found it, which, in your judgment, probably caused her condition—shock from mere fright or electric shock?" The latter question was objected to, but, the objection being overruled, he answered: "I would say that the more probable was electric shock." That constituted the second exception; and immediately after that answer, the defendant made a

motion to strike it out, which the Court refused, and that ruling is embraced in the third bill of exceptions. It was said in *Williams v. State*, 64 Md. 384, that an expert "may give an opinion not only as to the nature and effect of an injury, but also the manner or instrument by which it was inflicted." In 17 *Cyc.*, 234, a great many illustrations are given of what medical experts are permitted to testify, amongst them "what he would judge was the cause of certain symptoms under given circumstances; which among several possible causes was the probable or approximate one." But while great latitude has been allowed in the examination of medical experts, they should not be permitted to express their opinions merely because they are physicians, but experts must be confined to subjects about which they are, or are presumed to be, acquainted. If a physician does not know more about the effect of a given cause than jurors or other people do, his opinion can be of no service in enabling the jury to reach a proper conclusion. This Court said in *Dashiell v. Griffith*, 84 Md. 377: "It is an unsafe practice in the admission of testimony to allow witnesses to speak as experts unless the Court is well satisfied that they possess the requisite qualifications; not alone on this account, but the effect of such testimony is most difficult to estimate, from the fact that undue importance not infrequently attaches to it and gives to it an influence upon the minds of a jury to which it is not fairly or reasonably entitled." A physician may be a very intelligent man, and may be very well versed in his profession, but that does not make him competent to speak as an expert of things he is not specially acquainted with.

In this case there was no evidence that the plaintiff was injured in her efforts to extricate herself from a perilous position, as alleged in the latter part of the above quotation from the narr., and the question raised by the pleadings and evidence was whether the wire "came in contact with the plaintiff and gave her an electric shock." Indeed, one of the prayers afterwards granted instructed the jury that if they believed the plaintiff received no bodily injury from contact

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with the electric current emanating from the broken wire, but that her bodily injury and present condition were due to fright or nervous shock, caused by the flash or noise produced by said electric current, then the plaintiff was not entitled to recover, and the plaintiff's own prayer required the jury to find that the wire came in contact with her person or clothing and gave her an electric shock. The case as submitted to the jury was practically the same question asked Dr. Baum in the second bill of exceptions, excepting he was asked which of the two shocks probably caused her condition. Now if it be conceded that it is proper to ask a medical expert which of two possible causes was the probable or approximate one, surely he must be shown to have such knowledge of the effects of both as to be able to speak intelligently of them. This witness had not only not qualified himself as an electrical expert, or as a medical one acquainted with the effects of an electric current, but his cross-examination shows that he was not so qualified to speak. We will quote it: "Q. What kind of electric shock would she get if the wire did not touch her person? A. Apparently the wire might shock from fright; it is my opinion that it was the electric shock; whether there was contact was the question; I think you had better let some electrical expert explain that." Mr. Field: "You are not an electrical expert? A. No, sir. Q. You answer this was an electric shock; I did not know whether you meant a shock from electric current or fright produced by the electricity? A. I am unable to determine what the amount of the shock was received or anything of the sort. Q. If the testimony shows that there was no contact between the wire and the person would you still say this party was suffering from an electric shock? A. I am unable to answer that."

It is true that evidence was not in the record when the rulings on these exceptions were made, but it emphasizes the importance of seeing that a witness is qualified to speak as an expert before admitting his testimony. It shows that the opinion expressed by the witness was not founded on any special knowledge which qualified him as an expert. The theory

of the defense was that there was no contact between the wire and person, and yet the witness said he was unable to answer the question last above quoted. He had already said that the plaintiff's condition might have been caused by fright without receiving an electric shock, or by an electric shock, and although he is not an electric expert, and has not shown that he knew what effect on the body an electric current would have, if the wire did not come in contact with the person, he was permitted to testify: "I would say that the more probable was the electric shock." The answer to the question in the first bill of exceptions is not so objectionable as that in the second, for it only went to the extent of saying that it was probable that either fright or an electric shock might have caused her condition, but by the answer to the question in the second bill of exceptions he in effect said that an electric shock caused her condition. Again, the question *assumed* that either the shock from mere fright or an electric shock caused it, and was for that reason objectionable, as the defendant did not concede that it was caused by either, but on the contrary offered evidence tending to show other causes which were in part, at least, responsible for her condition. The question in the first exception was not altogether free from that objection, but the answer could not have done any particular harm, as we suppose that it cannot be denied that it was possible for an electric shock to have caused the condition of the plaintiff, but there was reversible error in allowing the question in the second bill of exceptions to be answered, and in not striking out the answer when the motion was made. The answer was not really responsive to the question, as the witness did not say whether he was able to say as a physician which probably caused her condition, but he proceeded to give his opinion.

We do not understand the fourth exception to be pressed. The fifth was to allowing the attending physician of the plaintiff to answer the question, "Whether or not a young woman in her condition is in a condition in which it would be proper for her to marry." The ground of the objection urged

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is that the question did not state what condition was referred to, but on cross-examination he was asked what condition he did refer to, and replied: "I referred simply to her nervous condition, the condition of her nervous system." The appellant was not therefore injured by reason of the condition referred to not being more explicitly stated in the question. But regardless of that, a similar question was asked Dr. Wilson, the answer to which went before the jury without objection. While we do not think there was any reversible error in the ruling of the Court, such testimony ought not to be admitted, as such opinions of physicians must be more or less speculative or conjectural, if not misleading, when they are based entirely upon the nervous condition of parties.

The seventh exception was to the following question asked Dr. Baum: "Will you kindly tell the gentlemen of the jury what will be the ultimate effect of the condition from which the plaintiff is suffering, as you have testified, upon her mind?" to which he answered: "My opinion is that it will progress and that she will eventually lose her mind." That is objected to because Dr. Baum had laid no foundation as an alienist to give such testimony. In answer to that it may be said in the first place that he had been a practicing physician since 1895, is a graduate of the Baltimore Medical College, and was connected with the Maryland General Hospital for six years. He attended the plaintiff when she received the injuries complained of for four or five days; was then called in again on May 10th, saw her then and the next day, and her condition was such that he called in Dr. Wilson in consultation. He advised her to go to the country so as to avoid excitement, and did not see her again until a few days before the trial. There would seem to be no doubt under these circumstances he was competent to express his opinion as to her mental condition under the decisions in *Crockett v. Davis*, 81 Md. 134, and *Jones and Collins*, 94 Md. 403.

It cannot be doubted that there may be cases in which the opinions of physicians on such subjects may have undue weight. The opinion of a family physician of a juror will

naturally have more influence on him than that of some other physician whom he does not know, or does not have the same confidence in, and hence trial Courts ought to be careful to see that a physician so called upon to testify has either had the opportunity to form a correct opinion from his own knowledge of the person whose mental condition is being inquired into, or that it is based on all the facts in the case reflecting on the subject, which facts the Court should be satisfied are sufficient to enable him to form an intelligent opinion from. The weight of the testimony is for the jury, but its admissibility is for the Court to determine. But the law of this State does not require the physician to be an alienist—in the sense that he is a specialist in that line. If such were the law it would often deprive the jury of such aid as an honest and intelligent physician could give them in reaching a proper conclusion. It would greatly add to the expense of such trials, and would often deprive those of limited means of medical testimony, if no one but a specialist should be permitted to testify. As was said in *Crockett v. Davis*, on page 149 of 81 Md., in giving the reason why a physician can testify as to the mental condition of a testator, without first stating the facts and circumstances on which his opinion is based: "That is because he is presumed to have become, from special study and experience, familiar with the symptoms of mental diseases, and therefore qualified to assist the Court and jury in reaching a correct conclusion." There is an excellent discussion of the subject in 1 *Wigmore on Evidence*, sect. 687.

Nor do we find the form of this question objectionable, as it was based on the condition the witness had testified she was in, as found from his own attendance upon her, and examinations of her by himself and with Dr. Wilson. There is no error shown in that exception, but if there had been it would not have been reversible error (unless this Court could see that there was or may have been injury to the defendant, which does not appear in this case), for the same testimony was admitted without objection from Dr. Wilson. In regard

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to the latter statement we deem it proper to say as affecting a matter of practice, that if counsel wants the benefit of such exception it would always be well to either object to the admissibility of similar testimony or have it understood that it is admitted subject to exception. When testimony has been admitted and an exception noted, counsel may deem it necessary to cross-examine the witness on the subject, and if it is simply a cross-examination he ought not to be deprived of his exception, provided the record shows he does not intend thereby to waive it, and that ought to be inferred when it is strictly cross-examination. There is perhaps some confusion in the cases on this subject, but the rule ought not to be carried to the extent of placing an attorney in the position that he must either waive his exception or permit the evidence in chief to stand without cross-examination. It is said in 2 *Ency. of Pl. and Pr.* 523, that a party cannot complain of the action of the trial Court "that illegal or incompetent evidence was admitted which was called out by his own counsel on cross-examination of his opponent's witness, but when an exception is duly taken to the admission of illegal evidence it is not waived by cross-examining the witness with respect to it." We think that is the correct rule, and any statement in the opinions of this Court to the contrary must be modified to that extent.

The seventh exception was taken to the ruling of the Court in permitting Dr. Wilson to answer the question: "Will you tell his Honor and the gentlemen of the jury whether or not in your judgment the condition in which you found Miss Corbin on May 11th was such that might naturally and probably have been produced by an electric shock?" Dr. Wilson had testified that he had two electric shocks himself, and had had three patients suffering from electric shocks. It is true that the latter were shocks from lightning and not from electric wires, but we think that such experience as he had had, taken in connection with his medical knowledge, was sufficient to justify the Court in permitting him to answer the question, which did not have in it the objection we have referred

to above in those asked Dr. Baum, but was merely whether the condition of the plaintiff "was such that might naturally and probably have been produced by an electric shock." It was held in *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, that a physician could give his opinion that injuries might have been caused by contact with a wire charged with electricity, and as the theory of the plaintiff was that there was such contact, if the jury so found, it was proper to inform them whether her condition was such as might have been so caused. The question did not assume that there had been an electric shock. In *Davis v. State*, 38 Md. 15, a question was permitted to be asked a medical witness, "whether from the nature of the wound and fracture described as fatal by the examining physician, such wound and fracture could have been, or were likely to have been, inflicted by the accidental falling of the deceased into a sink, in the condition in which it had been described by the witnesses." See also *Seymour's Case*, 92 Md. 432, and authorities above cited.

The eighth exception was not pressed. The ninth was taken to the action of the Court in stopping a witness in his answer to a question. The answer was objectionable because it was mere argument, but at any rate later on he testified on the same subject, that it was impossible for the wire to have struck her, which was the question he was answering when interrupted.

We find no error in the ruling on the tenth exception. Dr. Bevan did qualify himself as to the effect of an electrical current upon the human body, and he was allowed to testify fully as to that, but the question was whether, assuming the facts stated, amongst others, that the wire did not touch the person or clothing of the plaintiff, she could have received an electric current from the wire. As to that, the doctor was no more competent to speak than any other intelligent witness. He did not profess to be an expert on electricity, excepting as to its effect on the human body. He in substance so stated in a subsequent part of his testimony, but there had

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been no attempt to prove that he was, when the question objected to was asked.

This brings us to the last exception, which embraces the rulings on the prayers. The *first, second* and *seventh* prayers of the defendant and the special exception to the plaintiff's first prayer can be considered together. They present the question whether there was legally sufficient evidence to entitle the plaintiff to recover. The only difference between the first and second is that the latter refers to the pleadings, while the first does not. The seventh asked the Court to instruct the jury that there was no evidence legally sufficient to show that the wire touched the plaintiff's person or clothing at all, and the exception to the plaintiff's first prayer was on the ground that there was no evidence that the wire came in contact with the plaintiff and gave her an electric shock, and that there was no negligence on the part of the defendant.

There was certainly some evidence tending to show that the plaintiff received a shock of some kind, whether or not it was entirely the cause of her condition, as described by the doctors. There was also evidence by some of the defendant's witnesses that if the wire touched the clothing without touching the skin, it would have shocked the plaintiff if the clothing was in contact with the skin, and one of the defendant's experts, in answer to the question, "If the trolley struck her clothing would it have left any mark on her clothing?" replied: "No, sir; I can't say that it would," although he did say that if it struck the skin it would leave a mark. The context shows that he was speaking of the wire when he spoke of the "trolley." It was shown, therefore, that the plaintiff might have received an electric shock through her clothing without leaving any mark. The plaintiff testified that she was going west on the north side of Lexington Street, and when she reached Howard Street she saw a car on the opposite side, going south on the west track, and, to use her own words, as given in the record, "I kept on going, and the car started, and the trolley came off and kept bumping against

the wires; I did not pay any attention to that and walked on, and the car had gone far enough for me to pass behind it when I reached the track. When I was just about to reach the track *the wire came down into my face*; the wire came down, and there was such a flash right in front of my eyes—I took it to be so. I remember trying to run, but I don't know what happened after that.” Again she said that “the flash was just like a great flash of fire; like lightning, only it was much larger than a lightning flash, covering witness's whole face.” She could not say whether the wire touched her person or flesh, but if her testimony is correct as to the flash there is every reason to believe that it at least touched her clothing, for the testimony shows that there is no flash unless the wire comes in contact with something. A policeman testified that “he saw the wire that came down; that it was still hanging; that when it would strike anything it would throw a flash; when it was hanging loose it did not throw any.” Several witnesses testified that she was about the east rail of the north-bound track on Howard Street when the flash came; she turned and was about to fall near the curb when she was caught. The wire was suspended about fifteen feet above the track, and when it broke from the pole, and hung over the trolley wire, it might readily swing backwards and forwards. One of the defendant's witnesses said the wire moved “three or four feet around” after it fell, and another of them said that the plaintiff was near the track, and about the time she threw up her hands he saw a flash at the back of the car—“right about at the trolley pole at the back of the car.” Mr. Thiel testified that “he saw a flash from the trolley pole or trolley wire, and then the car started and went about six feet; it did not cross the curb; there was a slight noise, but not any more fire; then the car moved off again, and when the car moved off the second time witness saw some flashes about right back of the car, just about the same as if you light about two or three parlor matches, towards the west rail, towards the rail on the west side of the street.” He also said he saw the wire afterwards, and “it was lying be-

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tween the two tracks on the west side, just about the west side track of the south-bound car; it was lying in the track where the car had gone down." He said he did not see the plaintiff until she was about to the curb, that she seemed to faint and some gentleman caught her.

So, although the evidence of some of the witnesses contradicted her, if her statement is true she saw the trolley "bumping against the wires," and then walked on and the wire came down into her face when the car had gone far enough for her to pass behind it. She turned back toward the curb, would have fallen if someone had not caught her, and was unconscious for a considerable time. While jurors and others who are not electrical experts do not know a great deal about the effects of electricity, they do know some of them. Anyone might conclude from the testimony that she must have come in contact with a live wire to have produced the effects proven, if she had never had any nervous trouble before, as she swore she had not, and if her version of what occurred was true. Her statement was contradicted in some material respects, but if there was any evidence tending to establish her theory, as we think there was, the case should have gone to the jury, and therefore the first, second and seventh prayers of the defendant were properly rejected.

Nor are we of the opinion that there was no evidence of negligence on the part of the defendant. While the defendant has the right to use the public streets for its lawful purposes, great care should be required of it for the protection of those passing over them. If the span-wire was properly fastened to the pole, it would require great force to break it loose, and it certainly ought to have been so fastened as not to be liable to give way by any ordinary use of the trolley. If the bumping of the trolley against the wire resulted in causing this span-wire to be torn away from the pole, it was some evidence of negligence, and if such would not be the result if the span-wire was properly fastened, it would be some evidence that it was not properly fastened. This is not a case where the wire simply fell without any known cause, but it

fell after the trolley "kept bumping against the wires," according to the plaintiff. So without further discussing that branch of the case, we think the third, fourth and eighth prayers of the defendant were properly rejected and the special exception to the plaintiff's first prayer properly overruled.

Nor was there any error in rejecting the fifth, tenth and fourteenth. The fifteenth was properly rejected, if for no other reason because of its form. There are many cases, it is true, where certain specific facts are relied on and if believed by the jury would be sufficient to prevent recovery; but in this case, which apparently occupied several days, to instruct the jury that if they "believe the accident happened as described by the defendant's witness, Gilbert Porter, then the verdict of the jury must be for the defendant," would be an exceedingly dangerous practice to adopt. In the first place, if the jurors, or any of them, knew Mr. Porter and believed him to be a truthful man, they would hesitate to render a verdict for the plaintiff because they might regard the prayer as requiring them to pass on his veracity, and not simply on his recollection or opportunity to see and comprehend all that occurred. It would have the effect of bringing his testimony into more prominence than that of any other witness, and moreover the jury might not remember all of his testimony.

The sixteenth prayer was also properly rejected. Even if the hysterical condition of the plaintiff was not caused by the accident, it cannot be said that there was no evidence from which the jury could find that the accident caused her any injury. If she had never gone into the hysterical condition, which she claims followed the accident; if her theory as to how the accident occurred is correct, there was certainly some injury for which she could recover. To be so affected as to fall on the street, as she would have done if she had not been caught, and to remain unconscious for a considerable time, are injuries for which she could recover, if the hysterical condition had not followed.

The prayers that were granted for the defendant gave it the benefit of as much law on the subjects referred to in them

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as it was entitled to, but for error in the rulings in the second and third exceptions the judgment must be reversed.

*Judgment reversed and new trial awarded,
the appellee to pay the costs, above and
below.*

A motion for a re-argument was made, and in disposing of the same,

Boyd, C. J., delivered the opinion of the Court.

A motion for reargument has been made in this case, in the language of the brief in support of it, "chiefly on the ground that no objection was made below upon the ground that Dr. Baum was not qualified as an expert to answer the question," contained in the second bill of exceptions, "and that his qualification as an expert was therefore not open for review in this Court." As that point was not made at the oral argument or in the brief, but on the contrary the admissibility of the question was discussed, our attention was not directed to it and hence we did not refer to it in the original opinion. But without meaning to intimate that the rule which has been adopted in some jurisdictions should have the wide scope given it which is contended for by the appellee, even if it be conceded to be a general rule it cannot be applied in this case.

We recognized Dr. Baum as a medical expert in passing on several of the exceptions, and have no doubt as to his competency to testify *as such*, but that did not authorize him either to make conjectures or to express an opinion on a subject which required information that he confessedly did not have. The case, as tried below, depended largely upon whether the plaintiff had received an electric shock by coming in contact with a live wire, or whether her condition was the result of fright, without contact with the wire. Dr. Baum had testified that (quoting from the record): "From the history he learned of the case he concluded that the results of this case was the result of a shock," and upon being asked what kind of a shock he meant, he said: "Well, from the

history I elicited it was *rather* an electric shock or fright." He probably used the word "either" instead of "rather," which is in the record, for the next question was: "Tell the jury whether or not her condition could have been produced by fright merely without receiving an electric shock, or by the electric shock, if you say it could have been produced by either tell them which, in your judgment, was the most probable cause of it?" His reply to that was: "It is probable for either to have caused it; it is possible for an electric shock to have caused it; it is my opinion that an electric shock could have caused her condition." Then he was asked: "You have said either of them could; it is possible either of them could," and replied: "Yes, sir." Then came the question in controversy, which was: "Are you able to say as a physician, from her condition as you found it, which, in your judgment, probably caused her condition—shock from mere fright or electric shock?" The question was objected to but the objection was overruled, and he answered: "I would say that the more probable was electric shock." A motion was at once made to strike out that answer, but it was overruled.

Even from the present standpoint of the appellee, there ought not to be any serious doubt that the motion should have prevailed, and perhaps would have been granted if the learned Judge below had observed that it was not an answer to the question. Dr. Baum did not answer the question, "Are you able to say *as a physician*," etc., and has never said that merely as a physician he could answer that question, but he proceeded at once to give his opinion. He was not asked whether he could say as an electrical expert, or from the history of the case, or from any standpoint other than as a physician, which of the two causes probably produced her condition. Yet we are told that the appellant cannot have the benefit of its objection to the question, because it was not specially made on the ground that he was not a competent witness to testify as an expert. He was, as we have seen, admittedly a medical expert, and he was asked whether he could "say as a physician," etc. If the question had been otherwise

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unobjectionable, it would have been difficult to have excluded it on the mere ground that he was not an expert, because he was the kind of expert the question referred to. If he had first answered the question that was asked him, in the affirmative, he could have then been further questioned as to his knowledge as a physician of the effects of an electrical current, etc., and then the defendant could, and probably would, have objected on the ground that he was not competent to testify as an expert on the subject involved in the question, for he subsequently admitted on cross-examination that he was not an electrical expert and was unable to say whether the plaintiff could suffer from an electric shock if there was not contact between the wire and the person. It would, therefore, be carrying the rule contended for further than any authorities we are aware of have gone, and certainly further than we are willing to go, to say that the question cannot now be raised because the record does not show that the objection was specially made on the ground that the witness was not competent as an expert, notwithstanding the facts above referred to.

But in addition to what we have said, we are of the opinion that there was error in allowing the question to be asked, and such error as we clearly had the right to review. We cannot read the testimony of Dr. Baum without reaching the conclusion that his answer was nothing more than a conjecture—a pure guess—and furthermore it was based on the history of the case he had received from the plaintiff, or in some way outside of the record. If the condition of the plaintiff might have been the result of either of the two causes spoken of—fright or actual contact with the wire—as he swore it might have been, it was impossible for him to know any better than the jury which of the two caused it, unless there were some marks, or something to distinguish between the two, which he did not pretend was the case. In justice to the doctor we must assume, what his testimony as recorded seems to clearly indicate, that he was influenced by the history of the case as he had gathered it, which undoubtedly was

not permissible. If he had been sufficiently versed in the effects of electric currents, a hypothetical question might have been so framed as to elicit an answer that would have been admissible, but to permit him to answer the question under the circumstances we have related, was simply allowing him to decide the very question that the jury had to determine, without being better qualified than they were to do so. We do not mean to say there may not be cases in which an expert can say which of two causes may be the most probable, but this is not such a case, if we are to be governed by what is in the record. Dr. Baum did not pretend to be an electrical expert but testified that he was not, but if we could assume that he was, or if we conceded that that question cannot be reviewed by us, he did not suggest that there was anything, unless it be the history of the case, which enabled him to distinguish between the two causes, either of which he said could probably have produced the condition he found the plaintiff in.

So without referring to other questions, we must overrule the motion for a re-argument.

Motion for re-argument overruled.

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Syllabus.

OLIVER AND BURR, A CORPORATION, vs. THE
NOEL CONSTRUCTION COMPANY.

Building Contracts—Obligation of Sub-Contractor to Do Work According to Specifications of Original Contract—Claim Against Third Party Surrendered Upon Promise to Save Harmless Not a Guaranty—Set-off—Instructions as to Interest—Harmless Error.

When a sub-contractor agrees to do certain work on a building in accordance with the specifications of the original contract, he is bound by such specifications, and in an action by him against the contractor to recover for work done, the jury was properly instructed that if plaintiff's work was not done according to the specifications, and by reason thereof the defendant suffered loss, then he is entitled to an allowance against the plaintiff for the same.

The defendant was the contractor for the erection of a building according to certain specifications, and sub-let a part of the contract to the C. Company, which in turn sub-let its contract to the plaintiff company. The work as done by the plaintiff was not satisfactory and was condemned, whereupon defendant refused to pay the C. Company, which accordingly refused to pay the plaintiff. Then the plaintiff promised the defendant that if it would pay the C. Company, so that the company would pay it, the plaintiff would hold the defendant harmless against any loss it would sustain and be responsible for any damage. Upon the faith of this promise, the defendant paid the C. Company. In an action to recover for work done for the defendant company under another contract, defendant's plea of set-off alleged that in consequence of the manner in which the work had been done under the sub-contract with the C. Company, the defendant had been subjected to a loss greatly in excess of plaintiff's claim. *Held*, that this plea is a valid set-off, and plaintiff's promise to be responsible for any loss if defendant would pay the C. Company was

not a contract of guaranty, but was an original undertaking, upon the faith of which defendant surrendered its claim against the C. Company.

When the defendant files the general issue pleas to the declaration, an additional plea of set-off is not an admission of the correctness of plaintiff's account.

A prayer instructing the jury that they are at liberty to allow interest on a claim should fix the date from which interest should be calculated, but when it appears from the amount of the verdict that the appellant was not injured by the failure of a prayer to fix such date, the defect is not a reversible error.

Decided January 13th, 1909.

Appeal from the Baltimore City Court (SHARP, J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BUEKE, THOMAS and WORTHINGTON, JJ.

Richard M. Duvall and Rignal W. Baldwin, for the appellant.

J. Kemp Bartlett and R. Howard Bland, for the appellee.

BURKE, J., delivered the opinion of the Court.

This is the plaintiff's appeal from a judgment entered against it in the Baltimore City Court. The declaration contains the common counts only, to which the defendant pleaded the general issue pleas upon which issue was joined. Subsequently, by leave of Court, the defendant filed a plea of set off to which a replication was filed and issue was joined.

An itemized account was filed with the narr., by which it appears that the suit was brought to recover the sum of twenty-one hundred and fifty-one dollars and twenty-one cents alleged to be due the plaintiff by the defendant on account of certain work which will be presently alluded to. It appears from the bill of particulars filed by the defendant with its plea of set off that the plaintiff is indebted to it in

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the sum of four thousand one hundred and sixty-two dollars and seventy-five cents. The trial resulted in a verdict in favor of the defendant for nine hundred and thirty-four dollars and eighty-two cents upon which final judgment was entered. It is from this judgment that the appeal before us is taken.

The questions of law raised upon the record are simple; but there is very great conflict in the testimony. Only one bill of exceptions is brought up by the appeal, and that relates to the ruling of the Court upon certain prayers presented at the close of the whole case. With the weight of evidence and the credibility of the witnesses we have nothing to do, as those matters were exclusively for the jury, and if the case was fully and fairly submitted to the jury under the granted prayers the judgment must be affirmed. It is not necessary in order to dispose of the case to indulge in a minute discussion of the evidence. It will be sufficient to consider its general purport and effect. The record shows that in 1902 Edgar M. Noel and Daniel W. Thomas entered into a contract with the United States Government for the construction of certain buildings at the Naval Academy at Annapolis. This contract was assigned to the Noel Construction Company, the appellee, a corporation organized to finance the work. This work was to be done in accordance with elaborate and detailed specifications furnished by the Government. The Noel Construction Company sub-let the contract for the fire-proofing of the Cadets Quarters' Building to the Columbian Fire-proofing Company of Pittsburg, which in turn sub-let their contract to Oliver & Burr, the appellant, a New York corporation, and this last named company proceeded under that contract to do the work. The contract of the Pittsburg Company, which was sub-let to the appellant, was for the metal partitions on certain floors of the Cadets' building. Later the Government decided to raise the roof of this building, and add a fourth floor. The contracts for the metal lathing and hung ceiling were made directly between the appellant and appellee. On October 9, 1903, the appellant

wrote to the appellee proposing "to furnish and put in place all the metal furring required by the plans and specifications of Mr. E. Flagg, architect, for the Cadet Quarters' Building, at Annapolis, Md., including paragraphs 875 to 877 inclusive, and all other paragraphs therein referred to for the sum of seventy-five hundred (\$7,500.00) dollars; subject to contract that may be mutually agreed upon." This proposal was accepted by the appellee in a letter to the appellant of that date. By letter of October 31, 1903, the appellant proposed to furnish and erect partitions on the top floor of this building for the sum of fifty-nine hundred dollars, and the suspended ceiling for forty-seven hundred dollars. This offer was accepted by letter of February 18, 1904. The appellant at the time these contracts were made was engaged in doing the same character of work on the building under his contract with the Pittsburg Company, and he proceeded with the work under all the contracts.

The contract for the work of plastering to be done in this building was sub-let by the general contractor to Barwell & Cantlin, and the manner in which their work was done presented, as will be seen, one of the important questions of fact for the consideration of the jury. As the main questions in this controversy concern the steel studding and lath partitions and the plastering, it is necessary at this point to refer to the parts of the specifications which provide for that work. A question was made during the trial as to the duty of the appellant to do certain painting for which the defendant claimed an allowance in his plea of set-off. This question was raised by the plaintiff's eighth prayer, which was, however, abandoned in this Court, and it will not be necessary to consider the paragraph of the specifications providing for that work. The paragraphs of the specifications relating to metal and lath partitions and to the plastering are as follows:

"838. The partitions for toilet and bath rooms in basement of wings and in ground floor of stair towers, and partitions in roof space over Memorial Hall, extending from top of ceiling light up to skylight curb, are to be constructed of

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iron or steel studding and metal lath for 2 in. solid plaster finish. Studding to consist of 1 in. or $\frac{3}{4}$ in. steel channels as height or location may require, spaced 12 in. on centers and secured at bottom and top to the concrete, iron or other construction by clamps or angles, and properly braced or stiffened where so required. The partitions enclosing basement stairs in the two stair towers are to extend from ground floor up to and properly finish against bottom of stair string above.

"888. All plastering, except as hereinafter otherwise specified, is to be best three-coat work of lime mortar mixed in proper proportion to give the best results, the mortar for scratch and brown coats is to be gauged with Portland cement, using one-half of a barrel of cement to each cubic yard of mixed mortar for brick, terra cotta, block and concrete surfaces, and not less than three-quarters of a barrel for lathed surfaces."

The plaintiff must be held to have undertaken to do all the work contracted for upon the building in accordance with the specifications. Mr. Oliver was aware of the specifications and was no doubt familiar with their requirements, otherwise it would have been impossible for him to bid intelligently upon the work. Besides, his proposal of October 9, 1903, was to do the work in accordance with the plans and specifications. It would be most unreasonable to suppose that it was in contemplation of either party that the work could be done in disregard of the plans and specifications, because they both knew that work so done would not be accepted. Mr. Albert Oliver, the President of the appellant company, was the only witness offered in chief in support of the plaintiff's case, and he gave testimony tending to prove that the plaintiff had done the work embraced in the account filed with the declaration, and that the defendant was indebted to the plaintiff in the full amount claimed, to wit, \$2,151.21. He testified that the whole trouble arose from the plastering done by Barwell & Cantlin; that the plaintiff had nothing to do with the plastering, and that he had warned the plasterers that they were spoiling the work.

The defendant offered evidence tending to prove the following facts: That the work done by the plaintiff under its contract with the Pittsburg Company was not done according to specifications and had been condemned by the Government, and that this was known to the plaintiff; that the defendant withheld payments to the Columbian Company, which in turn withheld payments to the plaintiff; that the plaintiff, being badly in need of money which it claimed was due by the Columbian Company, agreed with the defendant over the telephone, on May 9, 1904, that if it would pay that company so that it could pay the plaintiff, the plaintiff would hold the defendant harmless against any loss it would sustain; that the Oliver & Burr Company would become responsible to the defendant for any damage it might sustain; that it did pay the Columbian Company upon the faith of this promise, and that that company paid the plaintiff; that this agreement had reference to the work done by the plaintiff under its sub-contract with the Columbian Company, and was confirmed by letter of the plaintiff dated May 9th, 1904. It further offered evidence tending to prove that the plaintiff in doing the work referred to in the agreement had not observed the requirements of the specifications, and that the work was entirely unsatisfactory and was condemned, and that in consequence thereof the defendant was subjected to a loss greatly in excess of the plaintiff's claim; that it sustained certain other items of loss set out in the bill of particulars filed with its plea of set-off. It further offered evidence to prove that the plastering was done in strict conformity to the requirement of the specifications, which has been herein quoted relating to that work.

In rebuttal, Mr. Oliver denied that he had made the agreement to be responsible for loss resulting from work done under the contract with the Columbian Company, and also disputed certain other allowances claimed by the defendant, and repeated his former statement that the whole trouble was due to plastering.

In this outline of the evidence are seen the issues of fact

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which the jury were to decide, as well as the legal questions concerning which the Court was asked to advise them. The plaintiff offered sixteen prayers. The Court granted the plaintiff's first and thirteenth prayers, and the defendant's sixth prayer. It amended the defendant's seventh prayer and granted it as modified, and refused all the other prayers. To the granting of the two prayers on behalf of the defendant, and in refusing its other prayers, the plaintiff excepted. The jury were told by the plaintiff's first prayer, that if they found from the evidence that the plaintiff undertook to provide the materials and erect the steel studding and lathing for the partitions on the ground floor and the first, second, third and fourth floors in the Cadets Quarters' Building, and the hung ceilings and extras, mentioned in the evidence, according to the specifications therefor, also offered in evidence; if they shall find said specifications, and for the prices mentioned in the plaintiff's proposals and the account offered in evidence, and that said work was performed and materials furnished in all respects according to said specifications; that the defendant accepted said work and paid the whole of said contract prices except the balance \$2,151.21, as shown by said account, then the plaintiff is entitled to a verdict of said balance with interest in the discretion of the jury from the time said work was fully completed, less such sum, if any, as the jury may find the plaintiff agreed to deduct from its \$5,900 proposal as testified to by the witness Noel, and any damage the jury may find resulted to the defendant from the withdrawal of the letter referred to in the letter of May 9th, 1904, written by Albert Oliver to the defendant, if the jury shall find said letter, and that it contained the agreement between the parties, and such sums as are charged in said account of the plaintiff and which the jury may find were disallowed by the United States Government; provided, if the jury shall find the total amount the defendants are entitled to, by way of set-off, exceed the amount of the present claim, then the jury are at liberty to find for the defendant for the amount of such excess.

By its thirteenth prayer the jury were instructed that the defendant was bound to establish by a preponderance of evidence the alleged agreement set up by the defendant as having been made by it with the plaintiff through the witness Noel over the telephone, and if the minds of the jury are left in a state of equipoise, then the defendant is not entitled to recover anything by reason of said agreement under its plea of set-off in this case.

We are of opinion that by the plaintiff's first and thirteenth prayers and the defendant's seventh prayer the whole case was fairly submitted to the jury. Under these prayers all the issues of fact raised by the pleadings were open to discussion before the jury, and the plaintiff under them was given a full opportunity to present all its contentions to the jury.

The proposition announced in the plaintiff's second prayer is more fully and correctly stated in its first; its third prayer contains an hypothesis of fact of which there is no evidence, viz, that the defendant made no objection to the work; its fourth, fifth and sixth are too general and indefinite. They contain no instructions to the jury as to the effect of the construction contended for, under the facts of the case, upon the rights of the parties. It by no means follows as a legal conclusion that the plaintiff was entitled to recover, even if the construction of the specifications stated in the prayers be correct. They contain no certain or definite guide for the jury. The subject-matter of the seventh prayer is fully covered in the first. The eighth prayer was abandoned. The ninth prayer erroneously assumed that the plaintiff was not bound under the contract of February 18, 1904, to comply with the specifications.

The tenth prayer asserts that the effect of the plea of set-off is an admission of the correctness of the plaintiff's account. This is maintained notwithstanding the fact that the general issue pleas filed by the defendant deny the whole claim.

The eleventh prayer is open to the same objection as the fourth, fifth and sixth, and was besides calculated to mislead the jury. The twelfth prayer asserted that there was no

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legally sufficient evidence in the case to entitle the defendant to recover any damages under the agreement of May 9, 1904. As we have heretofore shown, there was abundant evidence upon this point.

The fourteenth, fifteenth and sixteenth prayers are based upon a misapprehension of the nature of the agreement of May 9, 1904. They treat this contract as one of guaranty or suretyship; but, if it existed at all, it was an original undertaking on the part of the plaintiff to reimburse the defendant for losses which it might sustain on account of the work mentioned; provided the defendant would do certain things which the evidence tended to show it did do. Its object was to protect the defendant in case it surrendered its claim against the Columbian Company for the benefit of the plaintiff, which it did, and the plaintiff was paid the money which that company was withholding. When the object of the agreement, its subject-matter and the surrounding circumstances are considered, there can be no doubt that the agreement was a valid original undertaking.

There can, we think, be no possible objection to the plaintiff's seventh prayer. It merely told the jury that if they found that the plaintiff's work was not performed according to the specifications, and should find that by reason of the failure of the work to conform with the specifications the defendant suffered loss or damage, then the defendant was entitled to an allowance against the plaintiff for such loss.

By the appellee's sixth prayer the jury were instructed that in case they found for the defendant they were *at liberty*, in their discretion, to allow interest. It is objected to this prayer that it does not fix the date from which they might calculate the interest. Upon the facts contained in the record, there is no doubt that the prayer is defective in this respect, as there is no evidence as to when the several items in the set-off became due; but when the amount of the verdict and all the facts are considered we are not satisfied that this defect resulted in any injury to the appellant. The Court will not reverse a judgment for an error of this nature where it is rea-

sonably certain, as it is in this case, that the appellant has not been injured by the erroneous ruling.

This case, involving many disputed questions of fact, was fairly tried in the Court below, and submitted to the jury under instructions which allowed them to consider fully all the contentions of the respective parties, and from an examination of the whole record we see no good reason why the judgment, which was entered as the result of a long trial, should be disturbed, and it will, therefore, be affirmed.

Judgment affirmed with costs.

EDWARD L. FELGNER'S ADMINISTRATORS *vs.*
ANN M. SLINGLUFF—ANN M. SLINGLUFF
vs. EDWARD L. FELGNER'S ADMRS.

Merger—Conveyance of Equity of Redemption to Mortgagee—Mortgage Sale Is Res Adjudicata—Agreement that Mortgagor Shall Have Surplus of Proceeds of Sale of Property—Bill for Accounting—Evidence—Interest.

The conveyance of the equity of redemption to a mortgagee does not necessarily operate to merge and extinguish the mortgage. Whether it has that effect or not depends upon the intention of the mortgagee.

A conveyance of the equity of redemption to a mortgagee, after his assignment of the mortgage for the purpose of foreclosure, does not create a merger.

A sale under the power contained in a mortgage passes the title which the mortgagor had at the time the mortgage was recorded and not merely the title he had at the time of the sale.

The principle of *res adjudicata* applies to a mortgage foreclosure sale, and its validity cannot be attacked collaterally.

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Syllabus.

If the mortgagee was not authorized for some extrinsic reason to make the sale, it should be set aside by a bill of review or other proceeding.

The evidence in this case is held to establish the following facts:

That the plaintiff and her husband executed a mortgage upon a tract of land to the defendant to secure the payment of a certain sum of money, and also assigned the proceeds of a life insurance policy in part payment, under an agreement that the property should be sold at private sale or otherwise, that meanwhile the mortgagee should be entitled to the rents, and that any surplus over and above the amount of the mortgage debt arising from the proceeds of sale, the rents and the policy of insurance, should be paid over to the plaintiff. Afterwards, in order to avoid a foreclosure, plaintiff executed a deed to the defendant conveying the equity of redemption, which deed defendant did not place on record, but of this fact plaintiff was ignorant. The property was, however, sold, under a power in the mortgage and conveyed to the defendant, the mortgagee, his object in making the sale being to acquire an unquestionable title, but the plaintiff had no actual knowledge of this mortgage sale. After that, plaintiff occupied the property for a time and endeavored to sell the same. *Held*, that the title acquired by the defendant under the foreclosure sale was not intended to, and did not, destroy the rights of the plaintiff under the agreement relating to the surplus of the proceeds of sale.

Held, further, that the ratification of the mortgage sale does not preclude the plaintiff from asserting under these circumstances her rights to the surplus arising from a private sale of the property afterwards made by the defendant over and above the amount of the mortgage.

The defendant, after the above-mentioned mortgage sale, sold the property at private sale to different parties for a sum in excess of the mortgage debt, and plaintiff's bill in this case asked for a decree for the excess of the receipts of the defendant from the property in pursuance of said agreement. *Held*, that the plaintiff is not to be charged with the costs of the foreclosure proceedings, since the same were not necessary to vest the fee simple title in the defendant, and because those proceedings were had without notice to the plaintiff.

Held, further, that certain rents received from the property had not been paid to the defendant on account of the mortgage debt and should not be deducted from the amount of the same.

Held, further, that since the defendant only demanded four per cent. interest on the deferred payments of the purchase money of the property sold by him, the plaintiff should not be charged with six per cent.

Held, further, that the plaintiff is not to be charged with interest on the notes given for interest on the mortgage debt after their maturity, the intention of the parties being to the contrary.

Held, further, that the defendant is entitled to a certain allowance for taxes, insurance, advertisement and other expenses, as set forth in the opinion in this case and should be charged with interest on the life insurance policy which he failed to collect for some months, although it was collectible.

Held, further, that interest on the balance found to be due to the plaintiff should be allowed from the time defendant made a statement of the account after the private sale of the property by him.

Decided January 12th, 1909.

Cross-appeals from the Circuit Court of Baltimore City
(ELLIOTT, J.)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

Vernon Cook (with whom was *Harry B. Dillehunt* on the brief), for Felgner's Administrators.

William L. Marbury and *J. Kemp Bartlett* (with whom was *Jesse Slengluff* on the brief), for Ann M. Slengluff.

BOYD, C. J., delivered the opinion of the Court.

Mrs. Ann M. Slengluff filed a bill in equity against Edward L. Felgner for an accounting for all sums of money re-

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ceived by him from a property previously owned by her, and prayed for a discovery and a decree *in personam* against him for such amount as may be found to be due her. The lower Court decreed that he pay her the sum of \$3,802.03 and costs, and Mr. Felgner having died, his administrators were made parties defendant and entered an appeal from that decree. A cross-appeal was entered by Mrs. Slingluff.

On the 26th of September, 1899, Horace Slingluff, husband of the plaintiff, gave a mortgage, in which she joined, to Mr. Felgner for \$22,000.00 on a property in Baltimore County county called "Upton." Mr. Slingluff afterwards took the benefit of the Bankrupt Law, and on March 27, 1900, the mortgage was foreclosed and the property purchased by Mr. Felgner. At that time large improvements which Mr. Slingluff had begun were incomplete and the dwelling house was consequently in bad condition. Mr. Felgner agreed with Mrs. Slingluff that he would complete the repairs which were in course of construction, keep an account of the moneys expended thereon and, when completed, would convey the property to her, who with her husband was to give Mr. Felgner a note secured by mortgage upon said property. The parties do not materially differ as to the terms of that agreement—the principal difference being that the plaintiff claims it was made before the foreclosure sale of March 27, 1900, and the defendant that it was made shortly afterwards.

On May 1, 1901, a deed was executed for the property to Mrs. Slingluff, and Mr. and Mrs. Slingluff gave Mr. Felgner a mortgage of that date to secure a note for \$30,495, payable three years after date and six interest notes for \$913.85, each, one being payable every six months after date. The principal sum included the original mortgage of \$22,000, the repairs made by Mr. Felgner amounting to \$4,896.74, the costs of the foreclosure proceedings \$687.40, including a fee of \$500.00 to Mr. Dillehunt, who was the attorney who made the sale, and \$2,367.90 interest to May 1, 1901, which together with an adjustment of taxes, \$17.97—amounted to \$30,495.01. We do not understand the correctness of those

sums to be questioned, but the plaintiff claims that there should have been a credit of \$1,400.00 for rent received from David Hutzler, which will be referred to later.

As additional security, Mr. and Mrs. Slingluff agreed to assign to Mr. Felgner an endowment policy of insurance issued on the life of Horace Slingluff for the sum of \$5,000, which at the time, by reason of certain accumulations, had a cash value of something over \$7,000. The Slingluffs also agreed to furnish the dwelling house, to provide a gardener and do what they could towards securing a good rental. The object of this was to get the property in a condition that would enable them to dispose of it to the best advantage, in order to pay off the mortgage and have some surplus for the benefit of Mrs. Slingluff, which she claims it was agreed she should have. The insurance policy was assigned to Mr. Felgner, but the trustees in bankruptcy of Mr. Slingluff made a demand for it, and after some litigation the matter was finally compromised by dividing the value of the policy, which resulted in Mr. Felgner receiving \$3,574.15. Mr. Slingluff, who represented his wife, and Mr. Dillehunt, who represented Mr. Felgner, who was his father-in-law, practically agree as to what that agreement was, excepting Mr. Slingluff claims that the rents for 1900 were to go to Mr. Felgner while Mr. Dillehunt contends that the payment of rents to him was to begin with those of 1901. The rents were derived from the property during the summer season. Mr. Slingluff rented the property to David Hutzler for the summer of 1900 at \$1,400.00, to Louis Hamburger for the summer of 1901 at \$1,400. and to Levi Greif for the summer of 1902 at \$1,200.00, and Mr. and Mrs. Slingluff expended money and time with a view to making the property attractive to purchasers.

There were a number of interviews between Mr. Slingluff and Mr. Dillehunt, and considerable correspondence passed between them, some of which will be hereafter referred to—the letter of October 11, 1902, bearing more particularly on the agreement that Mrs. Slingluff was to have the surplus,

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over and above the claims and expenses of Mr. Felgner, out of a sale of the property. On February 24, 1903, a deed was executed by the Slingluffs to Mr. Felgner for the property embraced in the mortgage which was duly delivered to Mr. Dillehunt, but he put it in his safe and never recorded it. On April 17, 1903, Mr. Dillehunt, as assignee of the mortgage, reported a sale of the property under the power of sale to the Circuit Court for Baltimore County, in which report he states that he sold the property on April 8, 1903, to Mr. Felgner for \$24,000. That sale was in due course ratified by the Court, an Auditor's report was filed and ratified and the deed was made by Mr. Dillehunt, assignee, to Mr. Felgner on May 13, 1903. Both Mr. and Mrs. Slingluff deny any knowledge of that foreclosure sale until the matters connected with this suit were placed in the hands of Mr. Bartlett, who, they allege, first told them of it, and they claim that they supposed the deed which they executed had passed the title to Mr. Felgner, subject to the agreement which they say then existed.

Before this bill was filed Mr. Felgner had sold part of the property to Charles D. Fitzgerald for \$27,500.00 (as we understand the amount), and the balance to the Western Maryland Railroad Company for \$5,812.50, and the plaintiff claims that the purchase money received, the insurance money and rents more than paid Mr. Felgner, who she alleges was compelled to give her the surplus under the agreement. The defendant denies there was any surplus, but contends that if there was the foreclosure proceedings preclude any recovery. The first question therefore to be determined by us is the effect of those proceedings.

1. We cannot agree with the counsel for Mrs. Slingluff that there was a merger by virtue of the deed of February 24, 1903. A sufficient answer to that contention is that before the deed was made, to wit, on October 31, 1902, the mortgage had been assigned to Mr. Dillehunt. While he undoubtedly took the assignment subject to all equities existing between the mortgagor and mortgagee, the legal title was transferred to him and hence there was no merger by reason

of the deed to Mr. Felgner. The general rule is that: "In order for the mortgage to be extinguished by the union of titles of the mortgagor and the mortgagee, such titles must unite in the same person at one and the same time." 20 *Am. & Eng. Ency. of Law* 1068. Even when a mortgagee acquires the equity of redemption in his own name it does not necessarily follow that the mortgage becomes merged and extinguished, but it depends upon the intention of the mortgagee, and when it is for his benefit to do so the presumption is that he intended to keep the mortgage alive. *Ibid*, 1064; *Polk v. Reynolds*, 31 Md. 106.

2. But notwithstanding there was no merger, and assuming for the present that there was an agreement that the surplus derived from the sale of the property was to go to Mrs. Slingluff, which we will consider later, was the effect of the foreclosure proceedings such as the defendant contends for? It cannot be doubted that the doctrine of *res adjudicata* applies to a mortgage foreclosure proceeding, such as this, as it does to other judicial proceedings, and of course the proceedings taken in reference to the foreclosure of the mortgage cannot be attacked collaterally. Again we must differ from the position taken by the counsel for the plaintiff that inasmuch as Mrs. Slingluff had no title at the time of the foreclosure, the sale passed no title. The statute expressly provides that: "All such sales, when confirmed by the Court and the purchase money is paid, shall pass all the title which the mortgagor had in the said mortgaged premises *at the time of the recording of the mortgage.*" Sec. 11 of Art. 66 of Code. If that were not so, and it only passed the title which the mortgagor had at the time of the *foreclosure*, the mortgagor could deprive the mortgagee of the security by selling the property. The case of *Queen City B'g. A'n. v. Price*, 53 Md. 397, cited by the plaintiff, involved an altogether different question. There it was held that the supposed power of sale was invalid, and hence the sale and the subsequent proceedings were void. It was there said that: "The mortgage stood as if no power of sale had been inserted in it," but in this case there is no

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question about the validity of the power of sale, and if it could no longer be exercised by reason of the deed, the objection should have been made in the foreclosure case, or if the plaintiff was kept in ignorance of it, by reason of the conduct of the mortgagee, a bill of review or some appropriate proceeding in that Court was the proper remedy, if it be necessary to have that sale set aside.

3. But is that necessary under the circumstances of this case? The plaintiff is not contending that title to the property did not pass to Mr. Felgner—on the contrary, she contends that it had already passed by the deed. Mr. Dillehunt thus explains in his testimony why the foreclosure proceedings were taken: "After having gotten that deed I was afraid to record it because of the relationship between the mortgagor and mortgagee—I was afraid that somebody would say that they made it under duress, or something of that sort—I was a little fearful of it, and I did not record the deed, and then followed those foreclosure proceedings." He also said he thought at first of having the deed made to him, "so in case there was any trouble, the mortgage then could be foreclosed," but he changed his mind and thought it looked better to have it made to Mr. Felgner. The object of the foreclosure proceedings is thus clearly shown to have been simply to acquire the title in a way that Mr. Dillehunt thought was free from question, but he does not say that he ever notified either Mr. or Mrs. Slingluff of those proceedings, or of his intention to so proceed, and both of them swore that they were not aware of them. He never told them that he had not placed the deed on record, and Mr. Slingluff testified that when he heard of the sales made by Mr. Felgner he supposed they were made under the deed. It is difficult to believe that Mr. and Mrs. Slingluff would have executed the deed on February 24, 1903, if they had supposed, or if Mr. Dillehunt had then told them, that he would advertise the property for sale under the mortgage in less than a month, which he did. In Mr. Slingluff's letter of March 1st, 1902, he appealed to Mr. Dillehunt not to advertise the property as he was then thinking of doing.

He said that they would "be mortified and humbled in the eyes of the community, and all our efforts set at naught and my business injured by having the place advertised for sale at foreclosure proceedings." He offered to make a deed which Mr. Dillehunt was to hold until April 1st, and if they in the meantime paid the interest due he was to return the deed, and if the interest was not paid by that time, Mr. Dillehunt was to put the deed on record and they were to give quiet and peaceful possession of the property. No deed was then given, but on April 4, 1902, \$911.51 was paid, for interest. On October 11, 1902, Mr. Dillehunt wrote a letter to Mr. Slingluff in which he said: "Enclosed please find deed to be executed by yourself and wife *under the agreement*. In consideration of Mr. Felgner's forbearance to foreclose the mortgage on Upton you were to give him an absolute deed for the property, he agreeing on his part to allow you to sell the property before March 1st next and pay him his claim and expenses, *you to take any balance left*. After March 1st next, he will be privileged to sell the property at his own price without any recourse to him by you or your wife or anyone else." That deed was not executed for some reason and was lost, but another one was sent later which was the one executed February 24, 1903. Mr. Dillehunt was asked whether that deed was drawn in accordance with the letter of October 11th, and replied that it was not—"it was a new agreement with the same contents in it," "really a renewal of the old agreement; that is what it was;" and he admitted on cross-examination that the Slingluffs did not agree on February 24, 1903, that all their rights were to expire on March 1st.

It therefore appears from Mr. Dillehunt's own testimony, and the letters, that the object in making the deed was to avoid a foreclosure, and that the foreclosure proceedings were taken in order that the title might be perfected, which Mr. Dillehunt thought doubtful under the deed alone, and not for the purpose of getting rid-of whatever rights Mrs. Slingluff had acquired under the agreement. Indeed, no other conclusion could be reached without implying that Mr. Dille-

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hunt was guilty of fraud, for he does not pretend that he informed Mr. and Mrs. Slingluff that he would not make use of the deed, or that he had not recorded it. The sale was made under proceedings which had been begun on October 31, 1902—nearly four months before the deed of February 24, 1903—and must have been advertised in about three weeks after the deed was made, as the report shows it was advertised for more than twenty days before the day of sale, which was April 8, 1903. It cannot be pretended that there is anything in the record to suggest, much less prove, any agreement or arrangement between February 24, and the advertisement or sale of the property, by which such rights as Mrs. Slingluff had in the surplus, by virtue of the agreement, were surrendered, or were intended to be surrendered, and it is difficult to imagine a more effectual way of misleading the Slingluffs than was adopted, if such effect must be given the foreclosure proceedings as is now claimed for them. In justice to Mr. Dillehunt we must say that his testimony shows that no such effect was intended, but the sale was made, according to him, to perfect what he deemed would be a defective title under the deed. That being so, we must hold that the title acquired by Mr. Felgner under the foreclosure sale was not intended to, and did not, destroy the equity, if any, which Mrs. Slingluff acquired *under the agreement* and which resulted in the execution of the deed. If the Slingluffs were not aware of the sale, they could not be expected or required under the circumstances to object to it, and if they did know of it, they could not be supposed to believe or know that it was intended thereby to give any greater effect to it than Mr. Dillehunt admits, namely, to perfect what he thought was a defective title—they certainly did not have any reason to believe that such equity as they acquired when or before the deed was given was intended thereby to be destroyed. We cannot, therefore, hesitate to hold that under the peculiar circumstances of this case the plaintiff is not precluded by the ratification of the sale from obtaining the relief sought in this case.

4. The ratification of the audit at first seemed to present more difficulty, in so far as some of the items involved are concerned. But on further consideration we have no doubt about them. If Mrs. Slingluff had either actual or constructive notice of the foreclosure proceedings, as may be conceded, it is clear that if she is right in her contention as to the agreement, it could not have been the intention of the parties that after she and her husband had executed and delivered the deed, with the understanding that she should have the surplus, if any, if the property could be sold for more than the claim of Mr. Felgner, she was to be further subjected to large expenses in perfecting the title—especially without any notice to her of the necessity or desirability of proceedings to accomplish that end. She not only did not contest the proceedings, but if she had actually known of them she might very well have concluded that they did not affect her. She was not claiming the equity of redemption which the law gave her as mortgagor—on the contrary, she had surrendered it, as she and her husband believed then, and do not deny now. The sale under the power was to pass the interest she had *when the mortgage was recorded*—and not such as she acquired afterwards from the mortgagee. If she had filed exceptions to the sale, and the Court was of the opinion that Mr. Dillehunt's fears were well founded, it might have very properly overruled the exceptions on the ground that Mrs. Slingluff could not be financially injured by the proceeding, if her contention as to the agreement was right. And after the sale was ratified, the assignee of the mortgage might very well have claimed the right to have an audit made, so as to have the accounts between him and the real owner of the mortgage stated. There was no attempt to secure a decree *in personam* against Mrs. Slingluff for the balance as shown by that audit, and there could not have been without service on her, and then a Court of equity would not have passed a personal decree against her, if she had established the claim she now makes. It would be a fraud on her which a Court of equity would not assist in, if satisfied that her agreement was such

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as she now claims. After discussing the subject, it is said in *Story's Equity Pleading*, sec. 783 a: "But a former adjudication, even in a Court of equity, will not be a bar to a subsequent bill, unless the case made by the latter, *and the equity*, are substantially the same. It is said the grounds of the latter suit must be substantially identical with those of the former." That being so, as it undoubtedly is, and the equity claimed in this case being substantially different, and by no means identical, from that determined by the *ex parte* proceedings in the Circuit Court for Baltimore County, we are of opinion that they do not preclude the plaintiff from asserting her claim under this bill.

As it was not raised at the argument, we have not deemed it necessary to discuss the question whether the defense of *res adjudicata* was properly presented in this case; inasmuch as it was not made in the pleadings; or the further question whether sec. 36 of Art. 5 of the Code would require us to consider that defense, although not raised below. We would only add that it is not altogether free from doubt, as the evidence which might be used for that defense was perhaps admissible for other purposes, and hence we say it is at least doubtful whether section 36 of Art. 5 would apply. That such defenses should be raised in equity by the pleadings is the general rule. 9 *Ency. of Pl. and Pr.* 616 and notes; *Phelps on Jurid, Eq.*, sect. 63; *Barroll's Chy. Pr.* 129; *Wagoner v. Wagoner*, 76 Md. 310. But we will base our decision on the grounds stated above.

5. We come now to the question whether there was such an agreement as the plaintiff claims. It cannot be doubted that there was at one time. After Mr. Slingluff failed, he and his wife on the one hand and Mr. Dillehunt, representing Mr. Felgner, on the other hand, were endeavoring to arrange so that Mr. Felgner would not lose as mortgagee, and Mrs. Slingluff would eventually get something out of the property. In their effort to accomplish that, she, together with her husband, became responsible for a mortgage of \$30,495.00, and

assigned the policy of insurance which was then supposed to be worth over \$7,000. Mr. and Mrs. Slingluff apparently worked earnestly to pay Mr. Felgner the interest, and to save something for themselves. Mr. Dillehunt was evidently anxious, and feared that his father-in-law might not recover the money which he had loaned for him, and was also kindly disposed towards the Slingluffs. The mortgage was dated May 1st, 1901, and the first interest was due November 1st, 1901, and by that time Mr. Dillehunt had received \$1,400 from Mr. Hamburger for rent of the property, which he claims was to be applied to the principal. The letter of Mr. Slingluff of March 1st, 1902, admitted that there was interest due, which would seem to corroborate Mr. Dillehunt. In that letter Mr. Slingluff made a proposition to make a deed for the property which Mr. Dillehunt was to hold until April 1st, and if the interest was in the meantime paid the deed was to be returned, and, if it was not paid, they were to surrender possession. No deed was then made, but the interest was paid on April 4th, 1902, to November 1st, 1901. On June 30th, Mr. Dillehunt wrote to Mr. Slingluff that he would advertise the property in the next issue of the *Maryland Journal*, but it was not done, and on July 14th he wrote again saying that Mr. Felgner would wait until September 1st for the interest, which was that due on May 1st. Then on October 11th he wrote the letter enclosing the deed for execution, which we have quoted above. That deed was not executed, and the property was advertised for sale in November, but was withdrawn. Some time during the fall of 1902 Mr. Slingluff commenced negotiating with Dr. Geer, who was desirous of purchasing the property for use as a sanitarium. Those negotiations continued during that fall and winter, and Dr. Geer agreed to pay \$30,000 for the house and 64 acres of ground. The Slingluffs, who still occupied the property, moved out about June 15th, 1903, and Dr. Geer took partial possession, but residents of the neighborhood objected to a sanitarium being there and Dr. Geer was unable to con-

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summate the sale. Mr. Dillehunt testified that Dr. Geer and Mr. Felgner executed an agreement for the sale of that part of the property, and negotiations were then pending with the Western Maryland Railroad Company for the part it subsequently purchased.

Mr. Dillehunt also testified that Mr. Slingluff had nothing to do with the property after the Geer sale fell through, but Mr. Slingluff denies that, and said that he was negotiating with Mr. Allan McLane at the time Mr. Dillehunt sold the house and 64 acres to Mr. Fitzgerald, which was in November, 1903. Of course, Mr. Slingluff had nothing to do with the property after that. But in addition to the testimony of the Slingluffs, and some strong corroborating facts, such as their occupation of the property after the deed was made (and after the foreclosure proceedings also), until the middle of June when they surrendered it to Dr. Geer as the expected purchaser, and the admission by Mr. Dillehunt that he did make the agreement to take effect if the Geer sale was consummated, the books of Mr. Felgner show that he kept the account in the name of H. Slingluff down to July 5th, 1905. The defendant filed as an exhibit a copy of the account, and as late as July 2, 1906, Mr. Dillehunt furnished a statement of their accounts to Mr. Bartlett, attorney for Mrs. Slingluff. On July 5, 1905, Mr. Felgner received the purchase money for the portion of the property sold to the Western Maryland Railroad Company, and Mr. Slingluff then asked for a statement. Mr. Felgner replied on November 17, 1905: "Your favor of the 15 inst. addressed to Mr. H. B. Dillehunt was handed to me. In compliance with same, you will please find enclosed a statement of your account, which I hope you will find correct. The calculations were made to July 5th, the date of the settlement of the W. M. R. R. for the rest of the property." That statement is headed: "Mr. H. Slingluff in acct. with E. L. Felgner," and begins with amount of mortgage of May 1st, 1901 (which is stated to be \$29,095), and concluded with an interest charge as of July 5th, 1905, cred-

its him with various amounts, including cash, life insurance, rent, interest from C. D. Fitzgerald, cash from Fitzgerald on March 10th, 1905, of \$27,120.00, and cash sale to W. M. R. R. of July 5th, \$5,812.50. It is impossible to understand why he would thus have written to Mr. Slingluff and have kept the account with him, if the agreement was not such as the plaintiff contends. It was doubtless kept in the name of H. Slingluff by reason of the fact that the original mortgage stood in that name, and not in that of Mrs. Slingluff. There certainly could be no reason for charging the Slingluffs with interest up to the day the last purchase money was received, if the understanding was not such as that claimed by the plaintiff. According to his charges and credits, there was still a balance, which he carried forward as follows: "1905, July 5—Balance due me, \$1,409.46"—showing that he claimed that they then only owed him that amount, and not the balance found in the audit, as now relied on in this case. We are satisfied that there was an agreement such as was contended for by the plaintiff, and the expectation of getting something out of the property doubtless induced the Slingluffs to assign the policy of life insurance, to spend money and time in making it more salable, to subject themselves to many annoyances and finally to make a deed for it. We will now consider the items in controversy.

6. The first one we will consider is the Hutzler rent. The theory of the bill is that when the mortgage of May 1st, 1901, was given the plaintiff had paid the rent received from Mr. Hutzler in 1900, which amounted to \$1,400.00, and hence the mortgage should have been \$29,095, instead of \$30,495. Mr. Slingluff testified that he received the \$1,400.00 in four equal monthly payments of \$350.00, and that he endorsed three of the checks so received over to Mr. Dillehunt, and afterwards gave him his individual check for the other \$350.00. Mr. Dillehunt positively denies having received them, or either of them. But Mr. Slingluff also testified that he did not question the correctness of the amount of the mortgage,

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but that the Hutzler rent should have been applied to interest *on that mortgage*. In answer to the question, "On what mortgage?" he replied: "The \$30,000 mortgage," and he further testified as follows: "On May 1st, 1901, when the second mortgage was given, do you now say you owed \$30,495 approximately or not? A. Yes, sir. Q. You do? A. Yes, sir. Q. Do you now claim that \$1,400 from the Hutzler rent should have been deducted from that \$30,000? A. No, sir. Q. You do not? A. No, sir; it was interest on the money in the interim. Q. What interim? A. May, 1901." It is clear, therefore, that his testimony does not support the allegations of the bill. His letter of March 1st, 1902, admits that interest was then overdue, which would not have been the case if the Hutzler rent was to be applied to the interest on that mortgage. The statement furnished Mr. Slingluff by Mr. Felgner does begin with: "1901, May 1—Amt. of mortgage, \$29,095.00," but the mortgage itself shows that the amount was \$30,495, and inasmuch as the item just below is: "Dec. 31—Interest, \$1,171.77," it is probable that he was simply using that sum to show on what amount he calculated interest, as Mr. Dillehunt claimed that the \$1,400.00 received from Mr. Hamburger was to be applied on the principal. But without further discussing this item it is evident that either Mr. Slingluff or Mr. Dillehunt is mistaken, and inasmuch as the plaintiff must sustain her claim, and especially as she and her husband executed the mortgage for \$30,495, it would require more satisfactory evidence than we have to show that there was a mistake of \$1,400, made in the amount of it, and we cannot allow that item.

7. Then as to Greif rent. Mr. Slingluff claims that he received that (\$1,200) early in June, 1902, and endorsed a check over to Mr. Dillehunt. The latter positively denies having received it. Here again the letters are important. On June 30th, 1902, Mr. Dillehunt wrote to Mr. Slingluff that he would advertise the property in the next issue of the Maryland Journal; on July 1st Mr. Slingluff asked for a postpone-

ment until September 1st, and on July 14th Mr. Dillehunt wrote that Mr. Felgner directed him to say that he would wait until September 1st "for the interest on the Upton mortgage," and that if the interest was not paid by that date he would proceed to sell the property at once. \$911.51 had been paid on April 4th, and if Mr. Slingluff had turned over the \$1,200 check in June, no interest was then due on the mortgage, which had only been running from May 1st, 1901. So it is manifest that Mr. Slingluff is mistaken about this item, as the letters conclusively show.

8. There is considerable confusion in the testimony in reference to some of the other items, but we will consider the statement of the Judge below attached to his opinion in determining whether or not he reached a correct result. He excluded all the costs connected with the second foreclosure and we think properly. There was no necessity for that proceeding and under the agreement, as we have found it, it should not have been resorted to without at least consulting the Slingluffs. What we have already said will be sufficient to show that we do not think the plaintiff is precluded by the audit from objecting to those items. Nor do we think she should be charged with the expenses connected with the supposed defect in the title, by reason of the omission of the seal of the clerk from his certificate as to the two Justices of the Peace, who respectively took the acknowledgments and the affidavit to the first mortgage. She was in no wise responsible for the omission, was not consulted about the expenses and ought not to be made to pay those connected with the effort to correct this supposed defect. That applies to the fee paid counsel as well as those paid the Title Company. As Mr. Felgner only required Mr. Fitzgerald to pay four per cent. interest on the deferred payments it would be unjust to charge Mrs. Slingluff with six per cent. That was another instance of his acting without consulting her.

It is contended that inasmuch as interest notes were given, interest on these notes should be allowed from their maturity.

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Without determining whether such interest could ordinarily be recovered, it cannot be allowed in this case. In the first place Mr. Felgner proceeded throughout on the principle that by reason of the default in the payment of the interest note due May 1, 1902, the entire mortgage debt had become due, in accordance with the covenants in the mortgage, as he had the right to do; and then it is made clear by all the accounts filed in the case that there was not only no understanding between them that interest should be charged on the interest notes, but that the contrary should be inferred. He never made such demand on the mortgagors and such interest is not claimed in the statement of mortgage claim filed in the foreclosure proceedings. Indeed the interest notes are not even filed—at least are not in the record. So it is clear that interest on the interest notes should not have been allowed.

9. We have now considered all of the questions raised which we thought proper to refer to, excepting the method of stating the account adopted by the Court below and some of the items included or rejected affecting the amount ascertained to be due. The learned Judge allowed the taxes for 1901 and 1902 as charged by Mr. Felgner, but only allowed \$135.46 for taxes to November 14, 1903, instead of \$250.07 charged by him as paid for 1903. He did not allow an item of \$60.03, insurance paid that year. The two items charged in the accounts filed amount to \$310.10, but there is a credit of "Fitzgerald Adjustment of Taxes & Insur. \$130.58," which should be deducted and which leaves a balance on those items of \$179.52. We think that sum and not \$135.46 should be charged against the plaintiff—making a difference of \$44.06.

We are also of opinion that Mr. Felgner should have credit for \$145.36 insurance paid through Mr. Dillehunt but omitted from the account rendered to Mr. Slingluff, because it was overlooked. An item of \$46.50 charged in the account as of Jan'y 21, 1903, for advertising should also be allowed, as the evidence shows that sum was paid for advertising sale

which was withdrawn at the request of the mortgagors.

There are two items which seem to us should have been charged to the plaintiff, but as the record is not clear as to them the Court below can direct further testimony to be taken, if necessary by reason of the failure of the parties to agree, which so far as we can see ought readily to be done. They are the items of \$148.30 charged in the account of Mr. Felgner under date of May 12, 1903, for "Watchman, \$148.30," and that of \$120 included in the item in the statement by the lower Court of amount of sale to Fitzgerald. Mr. Dillehunt said in answer to the question what the first named item was for: "Caretaker up there, but that bill must have been paid, and that bill was paid." He was then interrupted by counsel and his testimony is left in some doubt as to what he meant by that answer, or who paid the bill. Then he went on to say that Mr. Slingluff moved out in June, 1903, and did not say when the bill was paid. There was apparently no occasion for a watchman in May, 1903, or prior thereto, as the house was occupied. We are therefore left in doubt as to that item, but if a watchman was properly put there for the protection of the property, or to prevent the insurance policy from becoming invalid, it should be allowed. In reference to the \$120.00 spoken of, we understand that the principal paid by Mr. Fitzgerald was \$27,500.00, but the Court below and counsel for Mrs. Slingluff speak of it as \$27,620.00. The account filed as "Defendant's Exhibit No. 2" shows that some interest was included in the \$27,120.00 received March 10, 1905, and the two interest payments credited in that account, as well as the other one, rendered to Mr. Slingluff, were each for \$540.00, which is four per cent. on \$27,000 for six months—\$500 having been paid on account of principal November 14, 1903. These two items therefore would seem to be proper charges against the plaintiff, but as there may be some question about them we will authorize the lower Court to take further testimony as to them, although as at present

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advised we would allow both of them.

On the other hand, we are of opinion that the defendant should be charged with interest on the amount received on the life insurance policy for one year. It was not actually received until March 4, 1904, but it was due in December, 1902, on a policy which had been made payable to the Slingluff trustees and Mr. Felgner. There was no valid reason for delaying the collection of it so long, and it could with ordinary diligence have been readily arranged in two months. Interest on the \$3,574.15 should therefore be added to that sum as a credit to the plaintiff.

Interest on the balance found to be due the plaintiff in accordance with this opinion should be allowed from November 17, 1905, the date of Mr. Felgner's letter enclosing the account in response to the request of Mr. Slingluff for a statement, instead of from June 1, 1906, as allowed by the lower Court. We think the method followed by the Judge correct, under the circumstances of this case—that is to say of allowing interest to November 14, 1903, the date of the sale to Mr. Fitzgerald, and making other charges and allowing credits to that time, so as to ascertain the balance. What we have already said will relieve us of further discussing that question. If Mr. Felgner proposed to charge Mrs. Slingluff with six per centum interest on the amount of the deferred purchase money until paid, he should at least have consulted her about his arrangement with the purchaser.

We have thus at great length discussed many of the points raised and have given the whole case due consideration. Inasmuch as the amount due under the conclusions we have reached and whether there will be any material change from the amount fixed by the decree below are left in doubt until the two items above left open are settled, we will remand the case without reversing or affirming the decree, for further proceedings in accordance with this opinion. We will require the administrators of the estate of Edward L. Felgner to pay two-thirds of the costs in this Court and Mrs. Sling-

luff to pay the remaining third—the costs below to be determined by the lower Court.

Cause remanded for further proceedings in accordance with this opinion, without reversing or affirming the decree, the administrators of the estate of Edward L. Felgner to pay two-thirds of the costs in this Court (including the transcript and printing of the record), and the remaining third of said costs to be paid by Ann M. Slingluff—the costs below to be determined by the lower Court.

PHILADELPHIA, BALTIMORE AND WASHINGTON
RAILROAD COMPANY *vs.* GEORGE
F. DIFFENDAL.

Carriers—Presumption that Freight Was Delivered in Good Condition to Terminal Carrier—Duty of Carrier to Ice Refrigerator Car and Transport with Diligence—Burden of Proof—Instructions—Evidence—Damage for Loss of Market—Judicial Notice of Location of Cities—Measure of Damages—Memorandum to Refresh Recollection of Witness.

In an action against a terminal carrier, by which goods were delivered in a damaged condition, if it be shown that the goods were in good condition when given to the initial carrier, the presumption is that they were in the same condition when delivered to the defendant, the next carrier, and the burden is upon it to show by way of defense that the goods came to its possession in a damaged condition.

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Syllabus.

When a carrier accepts for transportation a refrigerator car containing fruit, it has implied notice of the perishable nature of the freight, and is liable for a loss resulting from its failure to ice the car properly or to transport it with due diligence.

Plaintiff's evidence showed that on the evening of September 30, he loaded a refrigerator car with peaches in good condition, the ice bunkers being full of ice; that the car was consigned from a point on the Western Maryland Railroad to a dealer at Washington, D. C.; that the car arrived in Baltimore next morning, October 1st, at 6.30 o'clock, and was there delivered to the defendant company at 8.20 o'clock for transportation to Washington; that the consignee looked for the car on October 1st, but the car did not arrive until after 5 o'clock in the evening of October 2nd; that the bunkers then had no ice in them, the inside of the car being very warm and some of the peaches spoiled; that in an iced refrigerator car, peaches will keep for ten days, but if the car be not iced, then they are more injured than they would be by exposure to the sun in the open air. The defendant offered no evidence. *Held*, that the burden of proof was on the defendant to show that the damage was not due to any default on its part, and that the jury was properly instructed that the plaintiff was entitled to recover unless they find that the damage was not caused either by the failure of the defendant to transport the car with reasonable dispatch, or by its failure to use due care to ice the car.

When a witness testifies that a car arrived at a terminal connecting point at 6.30 A. M. and was delivered to the connecting carrier at 8.20, omitting to state whether this was 8.20 A. M. or 8.20 P. M., the jury may properly infer that this latter hour also has reference to the morning.

When a carrier is sued for damage resulting from its delay in the transportation of fruit, it is not necessary for the plaintiff to show that the defendant had actual notice that the fruit was intended for a certain market. The carrier is liable for the damage caused by its delay whether the loss was occasioned by a fall in the market price, or by damage to the goods themselves, or by a combination of the two causes.

The Court will take judicial notice of the location of two such

large cities as Baltimore and Washington, of the distance between them, and of the time required for the transportation of a railroad car from one city to the other.

The failure to state explicitly the measure of damages in an instruction is not reversible error, when it is apparent from the amount of the verdict of the jury, that the appellant was not injured by such defect.

Upon Motion for Re-Argument.

If a witness testifies that he made an entry or memorandum in accordance with the truth of the matter as he knew it to exist at the time of the occurrence, of which he is at the time of testifying still convinced, he may use such memorandum to refresh his recollection as a witness, although the memorandum does not awaken in his memory recollection of what is contained in it.

When a witness after consulting a memorandum made by him remembers the facts and testifies from his own recollection of the same, it is of no consequence whether the paper used is the memorandum or a copy thereof.

Decided January 12th, 1909.

Opinion upon motion for re-argument March 24th, 1909.

Appeal from the Circuit Court for Carroll County (BRA-SHEARS, J.)

Plaintiff's 1st Prayer.—The jury are instructed that if they find from the evidence that the plaintiff delivered to the Western Maryland Railroad Company at Cave Town, Maryland, on the 30th day of September, 1905, a carload of peaches belonging to the plaintiff, in good condition, packed in a refrigerator car, and consigned to J. A. Davis & Sons, in Washington, D. C.; and shall further find that said carload of peaches was carried over the line of the said Western Maryland Railroad to Baltimore, Maryland; and shall further find that said car of peaches was delivered by the said Western

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Maryland Railroad at Fulton Station, at said Baltimore, Maryland, to the defendant, a connecting carrier, running from Baltimore, Maryland, to Washington, D. C.; and shall further find that said car of peaches was delivered by the defendant to the said J. A. Davis & Sons in Washington, D. C., in a damaged condition, then the jury are instructed that the presumption of law is that said peaches were damaged while in the possession of the defendant, and their verdict must be for the plaintiff; unless the jury shall find such damage was not caused either by the failure of the defendant to transport said car with all reasonable dispatch, or by its failure to use all reasonable care, diligence and exertion to maintain continuous refrigeration in said car, or by its failure to take all reasonable precautions to protect said peaches from damage. (*Granted.*)

Plaintiff's 2nd Prayer.—The jury are instructed that if under the pleadings and evidence in this case they shall find that on the 30th day of September, 1905, at Cave Town, Maryland, the plaintiff delivered to the Western Maryland Railroad Company a carload of peaches belonging to the plaintiff, in good condition, in what is commonly known as a refrigerator car, to be carried from said Cave Town, Maryland, over the said company's line and connecting line or lines and delivered to J. A. Davis & Sons in Washington, D. C.; and shall further find that said carload of peaches was transported over the line of the Philadelphia, Baltimore & Washington Railroad Company, a connecting carrier running from Baltimore, Maryland, to Washington, D. C.; then if the jury so find they are instructed that it thereupon became the duty of the defendant, the Philadelphia, Baltimore & Washington Railroad Company, to use all reasonable care, diligence and exertion to maintain continuous refrigeration in said car by keeping a sufficient quantity of ice in the bunkers of said car for that purpose and to re-ice as often as was necessary to maintain said refrigeration; and if the jury shall further find that the said defendant did not use all reasonable care, diligence and exertion to maintain continuous refrigeration in

said car according to its duty as above set forth, and failed to take all reasonable precaution to protect said peaches from the effect of the heat; and further find that by reason of the defendant's failure to use the aforesaid care, diligence and exertion, and to take the aforesaid precaution, said peaches were damaged and were delivered by the defendant to said J. A. Davis & Sons in Washington, D. C., in such damaged condition, and the plaintiff sustained loss thereby, then if the jury so find their verdict must be for the plaintiff. (*Granted.*)

Plaintiff's 3rd Prayer.—The jury are instructed that if under the pleadings and evidence in this case they shall find that on the 30th day of September, 1905, at Cave Town, Maryland, the plaintiff delivered to the Western Maryland Railroad Company a carload of peaches belonging to the plaintiff, in good condition, loaded in a refrigerator car, to be carried from said Cave Town, Maryland, over the said company's line and connecting line or lines and delivered to said J. A. Davis & Sons in Washington, D. C., and further find that said car load of peaches was transported over the line of the defendant in this case, the Philadelphia, Baltimore & Washington Railroad Company, a connecting carrier running from Baltimore, Maryland to Washington, D. C., and that said car load of peaches was delivered to J. A. Davis & Sons in Washington, D. C., by the defendant in a damaged condition, then if the jury so find they are instructed that the burden is on the defendant to show that the damaged condition of said peaches was not caused by its failure to carry said peaches to the said J. A. Davis & Sons in Washington, D. C., with all reasonable dispatch, or by its failure to use all reasonable care, diligence and exertion to maintain continuous refrigeration in said car, or by its failure to take all reasonable precaution to protect said peaches from damage. (*Granted.*)

Plaintiff's 4th Prayer.—The jury are instructed that if they find for the plaintiff they shall allow the plaintiff a sum equal to the difference between that which they find would have been the market value of said peaches in Washington,

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D. C., if they had reached J. A. Davis & Sons in Washington, D. C., in the same condition in which the jury find they were delivered to the Western Maryland Railroad Company at Cave Town, Maryland, and that which the jury find was the actual amount of money received for said peaches in their damaged condition, if the jury so find, and the jury may in their discretion allow interest from the time said peaches were delivered to the said J. A. Davis & Sons to the time of trial. (*Refused.*)

Plaintiff's 5th Prayer.—The jury are instructed that if they find for the plaintiff they shall allow the plaintiff a sum equal to the difference between that which they find would have been the market value of said peaches in Washington, D. C. (if they had reached J. A. Davis & Sons in the same condition in which the jury find they were delivered to the Western Maryland Railroad Company at Cave Town, Maryland), and that which the jury find was the market value of said peaches in their damaged condition, if the jury shall find such damage, and they may allow interest in their discretion on said sum from the time the peaches were delivered to J. A. Davis & Sons to the time of trial." (*Granted.*)

The defendant specially excepted to the granting of the first, second, third, fourth and fifth prayers of the plaintiff, and assigned therefor the following reasons:

(1) Because there is no evidence in the case legally sufficient from which the jury can find under the plaintiff's first prayer (a) that the car load of peaches was delivered in good condition to the Western Maryland Railroad Company at Cave Town; or (b) that said car load of peaches was delivered by the Western Maryland Railroad at Fulton Station, Baltimore, Maryland, to the defendant; or (c) that the defendant was a connecting carrier with said Western Maryland Railroad and ran from Baltimore, Maryland to Washington, D. C.; or (d) that the defendant failed to transport said car load of peaches with all reasonable dispatch; or (e) that the defendant undertook to maintain continuous refrigeration in said car; or (f) that the damages to said peaches were caused

by the failure of the defendant to take all reasonable precautions to protect said peaches from damage; or (g) that said car load of peaches belonged to the plaintiff. (*Overruled*.)

2. Because there is no evidence in this case legally sufficient from which the jury can find, as respects the plaintiff's second prayer, (a) that the plaintiff delivered to the Western Maryland Railroad Company at Cave Town, September 30, 1905, a car load of peaches belonging to the plaintiff in good condition to be carried from Cave Town, Maryland, over said Company's line and connecting line or lines and delivered to J. A. Davis & Sons, Washington, D. C.; (b) that the Philadelphia, Baltimore & Washington Railroad Company, is a connecting carrier running from Baltimore, Maryland, to Washington, D. C.; (c) that the defendant did not use all reasonable care, diligence and exertion to maintain continuous refrigeration in said car according to its duty as above set forth; (d) that the defendant failed to take all reasonable precaution to protect said peaches from the effect of the heat; (e) that by the reason of the defendant's failure to use aforesaid care, diligence and exertion and to take aforesaid precaution, said peaches were damaged and were delivered by the defendant to the said J. A. Davis & Sons in Washington, D. C., in such damaged condition that the plaintiff sustained loss thereby. (*Overruled*.)

(3) Because there is no evidence in the cause legally sufficient from which the jury can find under plaintiff's third prayer, (a) that the car load of peaches was delivered to the Western Maryland Railroad Company in good condition; (b) or that said car load of peaches was to be carried from Cave Town, Maryland, over the line of the Western Maryland Railroad Company, and connecting line or lines, and delivered to said J. A. Davis & Sons in Washington, D. C.; (c) or that said car load of peaches was transported over the line of the defendant; (d) or that the defendant was a connecting carrier running from Baltimore, Maryland, to Washington, D. C.; (e) or that said car load of peaches belonged to the plain-

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tiff; or (f) that the defendant was guilty of any want of any care, diligence and exertion whatsoever in the transportation and protection from damage of any peaches belonging to the plaintiff. (*Overruled.*)

4. Because there is no evidence in this cause legally sufficient from which the jury can find, as to the plaintiff's fourth prayer, (a) that the car load of peaches were not in the same condition when delivered to the firm of J. A. Davis & Sons in Washington, D. C., as they were when delivered to the Western Maryland Railroad Company at Cave Town, Maryland; or (b) what was the market value at the time of the delivery of said peaches to said J. A. Davis & Sons. (*Not acted on by Court; plaintiff's 4th prayer refused.*)

5. Because there is no evidence in this case legally sufficient from which the jury can find, as respects the plaintiff's fifth prayer, the following facts: (a) what would have been the market value of said peaches in Washington, D. C., if they had reached J. A. Davis & Sons in the same condition in which they were delivered to the Western Maryland Railroad Company; (b) in what condition the peaches were when delivered to the Western Maryland Railroad Company; or (c) what the market value was of said peaches in their damaged condition. (*Overruled.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and WORTHINGTON, JJ.

Shirley Carter, for the appellant.

Lerin Stonebraker and *Harvey R. Spessard*, for the appellee.

WORTHINGTON, J., delivered the opinion of the Court.

This suit was instituted by the appellee, George F. Diffendal, against the appellant, The Philadelphia, Baltimore and Washington Railroad Company, to recover damages for the

injury which the plaintiff claims to have sustained by reason of the alleged negligence of the defendant in the transportation of a car load of peaches from Baltimore, Maryland to Washington, in the District of Columbia.

The plaintiff having obtained a verdict and judgment in the trial Court for \$608 the defendant has brought this appeal to correct certain alleged errors in the rulings of that Court.

At the trial of the case in the lower Court the defendant offered no evidence whatever in defence of the action, but relied upon what it contends was a failure of proof, on the part of the plaintiff, to sustain the action.

The principal ground of this contention is that the burden is upon the plaintiff to show by direct testimony that the peaches were delivered to the defendant carrier in good condition.

It is not disputed that if this fact had been proven, and also that they had been delivered to the consignee at the end of the route in a damaged condition, a *prima facie* case would have been made out against the defendant, but it is insisted that until proof of delivery to the defendant carrier in sound condition, is affirmatively shown, the defendant is not called upon to offer evidence in its own defense. In support of this contention defendant cites the cases of *Marquette, etc., R. R. Co. v. Kirkwood*, 45 Mich. 51; *Darling v. Railroad*, 11 Allen, 295, and some others.

The important facts shown by the plaintiff's evidence are substantially as follows:

The appellee is the owner of a peach orchard located near Cave Town, in Washington County, Maryland, along the line of the Western Maryland Railroad.

On Saturday, September 30, 1905, he caused to be picked and loaded on a refrigerator car standing on a siding of the said railroad at Cave Town, the car having previously been placed there for his use, 483 carriers and 126 baskets of peaches of the Salway variety. A carrier is a crate holding six small baskets of peaches.

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The car load of peaches was consigned to John A. Davis and Son, Commission Merchants, Washington, D. C. No price had been agreed on for the peaches, but the price of \$1.60 net, was guaranteed by Davis, over the telephone, for the carrier peaches, and more if the market would afford it. No price whatever was mentioned for the basket peaches, but the plaintiff testified that they would bring him 75 cents a basket.

That the peaches were carefully picked and handled is shown by the evidence. The loading of the car was finished about 6 o'clock Saturday evening September 30, 1905, and at that time the ice bunkers in the car were full of ice. The trap doors on top of the car, through which the ice was put into the bunkers, were tight, and it was a first-class dairy refrigerator car. The carrier peaches were of the first grade, highly colored round and perfect. The peaches in the baskets were just as good as those in the carriers but not so highly colored.

The plaintiff received no bill of lading from the Western Maryland Railroad Company at the time the goods were shipped, but a card way-bill was tacked on the car. Subsequently when plaintiff wanted to file his claim for damages, he obtained a bill of lading from the Western Maryland Railroad which he delivered back to that company when he filed his claim. The contents of neither the card way-bill nor the bill of lading, were introduced in evidence. Just at what hour the car left Cave Town over the Western Maryland Railroad does not appear, but it was shown by the witness, Hugh Scott, that the car was received at Fulton Station, Baltimore, on Sunday morning October 1, 1905, at 6.30 o'clock, and delivered to the defendant at 8.20. The Western Maryland Railroad being the initial carrier from Cave Town to Baltimore, and the defendant the connecting and terminal one from Baltimore to Washington. Lishear, a witness for the plaintiff, testified that he lived in Washington, that he was in the express business and did hauling for Mr. Davis, the consignee. That Mr. Davis notified him on Saturday

evening that he would have a car load of peaches coming in on Sunday and for the witness to look out for them. Witness looked for them on Sunday and also on Monday. He looked for them half a dozen times. The peaches finally came in over the defendant's line on October 2, 1905, between 5 and 6 o'clock in the evening. Witness further testified that after he found them, he and Davis looked at the peaches and the top layer was pretty rotten and there was no ice in the bunkers.

Davis, the consignee, testified that he knew the peaches were coming in, through a couple of telegrams he received. When he finally discovered that the peaches had arrived, that is on Monday evening between 5 and 6 o'clock, he went over to the car, looked into the bunkers and found no ice in them. He opened the car and it was very hot. The peaches in the top row were very bad. Further down the peaches were better. He immediately ordered ice to be put into the bunkers. The next morning he started to sell the peaches and sold them to the best advantage. He finished selling them on the 6th. He further testified that peaches would keep in a refrigerator car, if well iced, as long as ten days. After the peaches are in the car, if the ice goes out, the effect is worse then if they had been out in the sun. He received \$511.76 gross for the fruit, and after deducting freight and commissions, the net proceeds were \$373.63. That on Monday, October 2, 1905, peaches, like plaintiff's sold in Washington at \$2.25 per carrier, and \$1 to \$1.50 per basket.

We think there was evidence legally sufficient from which the jury could find that the peaches were placed in the car Cave Town in good condition, that the car was a good refrigerator car, and that the ice bunkers were filled with ice on Saturday evening at 6 o'clock, when the loading of the peaches was completed.

The finding of these facts was, under the circumstances, equivalent to explicit proof that the fruit was delivered to the initial carrier in sound condition.

The ordinary common law liability of a common carrier as

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to most commodities committed to its custody for transportation, is that of an insurer against all risks incident to the transportation, save such as result from the act of God or the public enemy, or the fault of the shipper, but with respect to perishable goods, which themselves contain the elements of destruction occasioning their own loss or deterioration, the carrier is not an insurer, but is required to exercise reasonable care and diligence to protect the goods from injury while in its custody as well as to deliver them with despatch to the consignee or connecting carrier. *Hutchinson on Carriers*, secs. 652 and 334; *Brennison v. Pa. R. R. Co.* 100 Minn. 102.

Where goods are transported by two or more successive carriers, it is the prevailing doctrine in this country, that if it be shown that the goods were delivered to the initial carrier in good condition, and that they were subsequently delivered to the consignee by the connecting and terminal carrier in bad condition, the presumption of law is, when such last named carrier is made defendant, that the goods were received by such carrier in the same condition they were delivered to the initial carrier, and the burden is upon the defendant carrier, of proving that such goods came to its possession in a damaged condition, by way of defense. *Laughlin v. C. & N. W. Ry. Co.*, 28 Wis. 204; *Savannah, etc., Ry. Co. v. Harris*, 26 Fla. 148; *Penn. R. R. v. Naive* 112 Tenn. 239 (79 S. W. 130); *Beard v. Ill. Central*, 79 Ia. 527 (7 L. R. A. 280); *Cane Hill & Co. v. San Antonia*, 42 Tex. Civil Appl. (95 S. W. 751); *Elliott on Railroads*, sec. 1450; 3 *Hutchinson on Carriers*, sec. 1348.

The reason of the rule, or rather the reason for the exception to the general rule, is that when a shipper consigns his goods to a line of connecting carriers to be carried to the point of destination, he of course loses all sight of and control over them.

From that time forward they are committed to the custody and management of the initial and connecting carriers, and these latter may each in turn, by the exercise of reasonable

precaution, ascertain the condition of the goods at the time of accepting them from the last preceding carrier, and thus in case of loss be able to prove where the loss occurred; whereas the shipper has no means whatever of obtaining the necessary information, or witnesses to prove his case, except by summoning the employees of the carriers whose own negligence has caused the loss. One great difficulty that he would encounter in pursuing this course, would be to discover which of defendant's employees had knowledge of the facts. Should he be able to discover these, it would still be dangerous for the shipper to rest his case upon their testimony since the natural impulse of mankind would be likely to sway them, in narrating the circumstances, to state the occurrence in the light most favorable to themselves, in order to palliate their fault. *Chicago, etc., R. R. Co. v. Moss*, 60 Miss. 1003 (45 Am. R. 425).

In *Orem Fruit Company v. N. C. Ry. Co.*, 106 Md. 4, this Court cited with approval *Meredith v. R. Co.*, 137 N. C. 479 (50 S. E. 1), to the effect that "on proof that a carrier received the goods in good condition the burden of proof rests on such carrier to show delivery in the same condition to the next carrier, or to the consignee, such proof being within its power."

In that case the initial carrier was sued jointly with one of several connecting and intermediate carriers, and this Court was discussing the question with respect to the burden of proof as applied to the initial carrier as a defendant, under a special contract to re-ice the car at certain designated places which the defendant had failed to do. 6 *Cyc.*, 479; *Mich. Central v. Myrick*, 107 U. S. 102.

In *Gwynn Harper Manfg. Co. v. Carolina Central R. Co.*, 128 N. C. 280 (38 S. E. 894), the Court said: "This Court has repeatedly held that among connecting lines of common carriers, the one in whose hands the goods are found damaged is presumed to have caused the damage and the burden is upon it to rebut the presumption."

In *Cane Hill, etc., v. San Antonio Ry. Co.*, 42 Tex. Civil

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Appeals (95 S. W. 751), it was held that "where goods are delivered to a common carrier to be carried by a series of connecting lines to the point of destination, and the goods are delivered in a damaged condition to the consignee, a *prima facie* case is made out against the terminal carrier alone."

In *Shriver v. Railroad*, 24 Minn. 506, the Court said: "Where goods are delivered to be transported over a line composed of several connecting carriers, it will, in the absence of anything to the contrary, be presumed that they reached the last carrier in the same condition in which they were delivered to the first."

Any apparent difference of opinion in regard to the application of the rule, as shown by the foregoing expressions of the Courts, is explained by an examination of the facts of each case.

As was said in the case of *Meredith v. Seaboard Air Line Ry.*, cited in *Orem Fruit Co.'s Case*, *supra*: "The same reason which requires the last carrier to show performance of duty applies with equal force to the first—that the source or means of proving the exculpatory facts are peculiarly within its knowledge and not otherwise open to the plaintiff."

This is the controlling principle governing the application of the doctrine, and the doctrine itself rests upon grounds of general convenience and public policy, and places no unreasonable burden on the defendant carrier. *Brennison's Case*, 100 Minn. 102 (110 N. W. 362); *Chicago v. Moss*, 60 Miss. 1003.

In this case when the defendant carrier, accepted the refrigerator car containing the peaches, it had implied notice, from the character of the car itself, that the goods in the car were of a perishable nature, and by accepting the car the carrier undertook the duty of exercising due care and diligence to protect the goods and to deliver them at their destination within a reasonable time. *Elliott on Railroads*, secs. 1449 and 1475; *New York Ry. Co. v. Cromwell*, 98 Va. 227 (35 S. E. 444); *Beard v. Railway Co.*, 79 Ia. 518; 1 *Hutchinson on Carriers*, sec. 334.

Failure to properly ice the car, or to deliver the same properly to the consignee at Washington, would be such default on the part of the carrier, as to render it liable for damages resulting thereby to the fruit. *Brennison's Case, supra.*

If the defendant desired to ascertain the condition of the fruit or of the ice tanks at the time the car was delivered to it at Fulton Station, it had ample opportunity through its agents and servants to do so, and if it could show that the fruit was then in a damaged condition, such evidence would tend to exonerate it from blame.

But the defendant offered no evidence whatever, and the plaintiff's evidence was clear that when the car reached Washington late on Monday evening, there was no ice in the bunkers, and on opening the car it was found to be very hot inside; the peaches at the top of the car being badly damaged.

We are unable to accept the doctrine of the cases cited by defendant in support of its contention in this respect, and under the circumstances of the case, as presented by the record, we must hold that the burden was upon the defendant to show that those conditions were due to no neglect or default on its part.

The first and principal contention of the defendant cannot therefore be sustained.

2. It was also contended by defendant's counsel that the evidence of Hugh Scott, a witness for the plaintiff, as to the time when the carload of peaches arrived at Baltimore, and was there, at Fulton Station, delivered to the defendant, was not admissible, because witness read in part from a record book kept by himself. So far as the witness used the book to refresh his recollection, merely, his testimony was competent, but the book itself was not proper evidence to go to the jury under the circumstances.

The error in this respect was, however, harmless as the witness testified that of his own knowledge, independent of the record, after refreshing his memory thereon, the car came into Fulton Station at 6.30 on Sunday morning, and that it

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was delivered to defendant at 8.20. He omitted to say whether the delivery was made at 8.20 a. m. or 8.20 p. m., but under the circumstances we do not consider this omission fatal to the plaintiff's case. As the witness had just stated that the car came in at 6.30 in the morning, the jury may very properly have inferred that the hour of 8.20, named by him as the time when the car was delivered to the defendant, had reference to the morning also. But even if not delivered to defendant until 8.20 p. m. the burden would still be upon the defendant to show that the peaches were then in a damaged condition in order to exculpate itself from blame.

3. The defendant's third exception is to the ruling of the Court admitting the evidence of the witness Davis in regard to the market value of first-grade Salway peaches, on the Washington Market, on Monday, October 2nd, 1905. The ground of this exception is, that there was no evidence in the case to show that the defendant had notice that the peaches were intended for Monday's market, and no evidence that it could by the exercise of due diligence have delivered the peaches at their destination in time for the market of that day.

Under the circumstances of this case, we do not deem it essential that the plaintiff should have affirmatively proven that the defendant had actual notice that the freight was intended for Monday's market.

It became the implied duty of the defendant in accepting the carload of fruit for transportation to use due diligence to deliver the same at its destination within a reasonable time (*Hutchinson on Carriers*, sec. 652), and for a breach of this duty resulting in loss to the plaintiff, the defendant was responsible in damages, whether the loss was occasioned by a fall in the market price, or by damage to the goods themselves, or by a combination of the two causes. It was so held in *Collard v. Ry. Co.*, 7 H. & N. 79; besides, the defendant had such notice as may be reasonably inferred from the circumstances of the case and the course of business. *B. & O. R. R. Co. v. Whitehill*, 104 Md. 311.

As to the exercise of due diligence on the part of the defendant, in the absence of direct proof, the Court may take judicial notice of the location of two such large and important cities as Baltimore and Washington, as well as of the distance between them, and of the approximate length of time required to transport a carload of goods from one city to the other by the modern means of conveyance. 16 *Cyc.* 863.

The lower Court no doubt took such notice and deemed it entirely feasible for the defendant to have carried the car from Baltimore to Washington in time for Monday's market, and as the defendant has failed to offer any exculpatory evidence whatever on its part, we are not prepared to say that the lower Court committed error in allowing the evidence to go to the jury.

4. What we have said practically disposes of the special and general exceptions to the granting of all plaintiff's granted prayers, which we will ask the reporter to set out in his report of this case.

The plaintiff's fifth prayer concerning the measure of damages ought to have been more explicit as to the manner in which the jury should ascertain the amount of plaintiff's loss, but it is apparent that the defendant was not injured by this defect.

It was understood before the peaches were shipped from Cave Town that the plaintiff was to have \$1.60 net per carrier for the peaches in carriers, and more if the market would afford it. The plaintiff also testified that the basket peaches were worth 75 cents per basket, to him.

The sum allowed by the jury to the plaintiff, added to the net amount received by him from the sale of the damaged fruit, only yielded him, in the aggregate, 75 cents per basket for the basket peaches, and \$1.67 per carrier for the carrier peaches, with interest; or but a trifle more per crate than the minimum price he was to receive for them according to his original understanding with the consignee. The plaintiff was entitled to be compensated to the extent of his loss, and

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we cannot see that the jury was misled by the instructions as granted.

Where an erroneous instruction results in no injury to the appellant, this Court will not reverse the judgment. *B. & O. R. R. Co. v. Pumphrey*, 59 Md. 402.

Finding no reversible error in the rulings of the lower Court, the judgment will be affirmed.

Judgment affirmed with costs.

BRISCOE, PEARCE and BURKE, JJ., dissent.

A motion for a re-argument was made, and in overruling the same,

WORTHINGTON, J., delivered the opinion of the Court.

The appellant has filed a motion for a re-argument in this case and assigns as its chief reason in support thereof, that the evidence of Hugh R. Scott, an employee of the initial carrier, as to the time when the car containing the peaches reached Fulton Station, was improperly admitted.

Scott testified that his record showed that the car arrived at 6.30, and was delivered to the defendant about 8.20 Sunday, October 1st. That he was on duty at that time and delivered all cars. That he saw this particular car backed over to the defendant's road.

He further testified that he refreshed his memory by referring to his book, and that he would have to refer to his record in order to state the time when the car arrived and when it was delivered to the defendant.

The witness also stated that of his own personal knowledge outside of his record, that as near as he could tell the car was delivered to the defendant about 8.20 Sunday, October 1st, but of course his testimony on cross-examination, as already indicated, shows that he was obliged to refresh his recollection from his book. And this is all the law requires.

If the witness swears that he made the entry or memorandum in accordance with the truth of the matter, as he knew it to exist at the time of the occurrence, of which he is at the

time of the trial still convinced, he may use such memorandum to refresh his recollection; even where the memorandum does not awaken in the memory of the witness any recollection of anything contained in it, but nevertheless, knowing the writing to be genuine, his mind is so convinced that he is on that ground enabled to swear positively to the fact, the testimony will be received. *Martin v. Good*, 14 Md. 398.

Where the witness, after consulting the memorandum, remembers the facts and testifies from his own recollection of the same, it is of no consequence whether the paper used is the original memorandum or a copy thereof. 8 *Ency. Pl. & Pr.*, p. 140; *Bullock v. Hunter*, 44 Md. 416.

It would certainly be highly unreasonable to expect the employee of a railroad company, at one of its stations or terminals, to remember the day and the hour when every car arrived there, and when it departed, or was delivered to the connecting carrier, wholly independent of the records kept for that purpose.

We think the lower Court was entirely right in permitting this witness' testimony to go to the jury for its consideration.

The question of the measure of damages having been considered fully in the opinion already filed in this case, no further discussion on that point is deemed necessary.

We have examined the other reasons assigned in support of the motion for a re-argument, but find no sufficient reason for granting the motion, and the same will therefore be overruled.

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Syllabus.

HARRY B. WALTER, INFANT, vs. THE BALTIMORE
ELECTRIC COMPANY ET AL.

*Fall of Electric Wire in Street Prima Facie Evidence of
Negligence.*

The fact that a wire of an electric lighting company, strung over a public street of a city, falls upon, and injures, a person passing along the street, is itself sufficient *prima facie* evidence of negligence on the part of the company and casts upon it the burden of overcoming that presumption.

Decided January 13th, 1909.

Appeal from the Superior Court of Baltimore City (HARLAN, C. J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

Thomas G. Hayes and *Charles F. Stein*, for the appellant.

The single question presented by this appeal is, whether or not, when a pedestrian, lawfully upon a public street, and using due and ordinary care, is injured by contact with a broken wire hanging down in such street, charged with a high and dangerous current of electricity, the person or corporation who owns, controls and maintains said wire is, solely upon these facts, in the absence of *explanation*, *prima facie* guilty of negligence toward the injured person, and whether or not upon the proof of the above facts does the maxim of *res ipsa loquitur* apply, and is the plaintiff entitled to go to the jury on the question of negligence *vel non* of such owner on singly and solely the proof of the above facts? The learned

lower Court ruled that the plaintiff was not entitled to go to the jury on the proof of the aforesaid facts, as such facts alone were no proof of negligence, and instructed the jury to find for the defendant, because the plaintiff had failed to show any negligence on the part of the defendant, the Consolidated Gas Electric Light and Power Company. The contention of the appellant was that these bare facts alone, in the absence of any *explanation* on the part of the defendant owner of how the wire happened to be hanging down in the street, how long it had been so hanging down, etc., entitled the plaintiff to recover; or, in other words, that to the accident and the physical facts connected with the accident, the maxim of *res ipsa loquitur* applied. All the authorities, including this Court, so hold, as follows:

1. Every text writer states the case to be that injury to a person lawfully on a public street, using due and ordinary care, by a high tension wire of an electric company hanging down in the street as an obstruction, is on this single showing, in the absence of explanation, *prima facie* liable to the injured person for its negligence. *Jaggard on Torts*, p. 864; *Croswell on Electricity*, sec. 249; *Keasbey on Electric Wires*, sec. 243; *Joyce on Electric Law*, sec. 606; 2 *Cooley on Torts*, 3 Ed., p. 1, 426; *Elliott, Roads and Streets*, sec. 826; 1 *Thompson on Negligence*, sec. 812; 1 *Shear. and Redf., Neg.*, sec. 6; 10 *A. & E. Ency. Law*, 874; 15 *Cyc.* 477, 478.

"It may be doubted whether persons or corporations employing for their own private advantage so dangerous an agency as electricity ought not to be regarded as *quasi insurers* as toward third persons against any injurious consequences which flow from it." *Thompson on Electricity*, sec. 65.

2. The Supreme Courts of the States, with perhaps one or two exceptions, have held that a person on a public street injured by a sagging or hanging wire charged with a high tension of electricity has a *prima facie* case of negligence against the owner of the wire, if *unexplained*. *Hebert v. Lake Chas. Co.*, 111 La. 522, 64 L. R. A. 101; *Boyd v. Portland Elec. Co.*, 40 Or. 126, 57 L. R. A. 632; *Snyder v. Wheeling Elec.*

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Co., 43 W. Va. 661, 39 L. R. A. 499; *Denver Elec. Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566; *Gannon v. Laclede Co.*, 145 Mo. 502, 43 L. R. A. 505; *Newark Elec. Co.*, 69 N. J. L. 505, 57 L. R. A. 624. The Oregon case of *Boyd v. Portland Elec. Co.*, *supra*, thus states this principle of law: "Electricity is a dangerous element, and those who make merchandise of it are legally bound to exercise that degree of care that will render its use reasonably safe; and as the wires which convey it cannot safely be permitted within reach of travelers, a presumption arises when they are found out of their proper place that those having them in charge have been negligent. The Courts quite universally hold that proof that a live wire was down in a street and injury resulted therefrom is *prima facie* evidence of negligence."

3. There is but a single Federal Court which has passed on this exact question. In speaking of a broken wire hanging in a street, this Court said: "It was a fair question for the jury to decide *whether the defendant had not failed in its duty to the public* by allowing its wire to get into such a condition that it would easily break and in breaking would be likely to fall across the electric light wire, and become dangerously charged. *It was not incumbent on the plaintiff to prove more under this head.*" *W. U. Tel. Co. v. Thorn*, 12 C. C. A. 109, 64 Fed. Rep. 287.

4. There are a number of cases of other State Supreme Courts in which it has been expressly and directly decided that injury to a person on a public street by a live wire of an electric company creates a presumption of negligence on the part of the owner, controller and maintainer of the wire, and the decisions of these Courts have been cited with approval by this Court in the case of *W. U. Tel. Co. v. Nelson*, *infra*. These cases are the following: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 345; *S. W. T. & T. Co. v. Robinson*, 1 C. C. A. 684, 50 Fed. Rep. 810; *Uggla v. West End S. Ry.*, 160 Mass. 352.

In *Haynes v. Raleigh Gas Co.*, *supra*, there is this expression of the rule: "Proof that the *death-carrying wire* was put

above the street by the defendant and was its property and under its management and control of its servants, and that by contact with the wire the deceased, having a right to be in the street, was killed, a complete *prima facie* case of negligence was made out. * * * The plaintiff should have been allowed to say to the defendant: *'The wire you put in the street killed my son while passing along the highway, as he had a right to do. If you are not in default, show it and escape responsibility.'*

5. This Court, by a clear and strong opinion, has decided this exact question of law, in *W. U. Tel Co. v. Nelson*, 82 Md. 311, which has become a leading case. The Supreme Courts of five States have cited, approved and followed this Maryland case on this exact point, as to the presumption of negligence from an injury to a person on a street, from a live electric wire. This law is stated as follows: "It follows from this that if the property of the defendants was not in proper condition, and by reason thereof Nelson was injured, *these facts alone, in the absence of the evidence to show the defect originated without the fault of the companies, afforded a prima facie presumption of negligence. In such a case the doctrine of res ipsa loquitur fairly applies.*"

6. The same law of presumption of negligence has been applied in this and other Courts to accidents to persons on public streets and other places. Some of these many cases are the following: *Murray v. McShane*, 52 Md. 217; *Treusch v. Kamke*, 63 Md. 281; *Howser v. C. & P. R. Co.*, 80 Md. 146; *Decola v. Cowan*, 102 Md. 551; *Strasburger v. Vogel*, 103 Md. 85; *Byrne v. Boadle*, 2 H. & C. 722; *Scott v. London Dock Co.*, 3 H. & C. 596; *Kearney v. London R. Co.*, L. R. 5 Q. B. 411; *Cummings v. Nat. F. Co.*, 60 Wis. 603; *Mullen v. St. Johns*, 57 N. Y. 567.

Vernon Cook (with whom were Gans & Haman on the brief), for the Baltimore Electric Co. and the Consolidated Gas, etc., Co., appellees.

The infant plaintiff, a boy eight years old at the time of

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Argument of Counsel.

the trial, and seven years old at the time of the accident, was put on the stand and testified that on the day of the accident he went from his house on Harford Avenue to a store a short distance therefrom, and that on his way home he was swinging around a certain telegraph pole, when a wire fell and struck him on the head, or swung around his head. He endeavored to push it off with his left hand, but got caught in it and was thrown into the street. At the time of the accident he was alone. He had passed the telegraph pole in question only a few minutes before on his way to the store. He testified on cross-examination that there was no wire down at that time, but, on re-direct examination said he did not know whether it was down at that time, or not.

Minnie Knox, a colored woman, who was passing along Harford Avenue at the time in question, testified that she was near the boy and saw him fall out in the street. She looked to see what was the matter and found he was struck with a wire. She called for help. Other witnesses testified to seeing the boy lying in the street in contact with the wire, immediately after the accident. A Mrs. Welsh identifies the wire as the middle wire on the house side of the second long cross-arm from the bottom of a pole, which pole was the second pole south of North Avenue, on the west side of the street. It was admitted that Harford Avenue is a public highway, and that the wire referred to by the witness, Mrs. Welsh, was at the time of the accident, a wire owned and controlled by the defendant, the Consolidated Gas Electric Light and Power Company. This is practically the whole case as proved by the plaintiff.

There is absolutely no evidence to show when the wire broke. The inference, as far as we can draw any inference from the testimony, seems to be that it must have broken just at the moment of the accident. There is absolutely no evidence to show what caused the wire to break. There is no evidence to show any defective condition of the wire previous to the accident, or at the moment of the accident, and there is no evidence to show that the wire had been hanging over the

street prior to the moment of the accident, or that there had been any dangerous condition of any kind whatever in connection with the wire prior to the very moment of the accident. Mrs. Welsh testifies that the broken wire was in contact with one of the wires of the street railway company on Harford Avenue. She says: "The broken wire had fallen against the trolley across the wire that crosses the trolley pole."

The evidence shows that the boy was injured by burns, caused by an electric current, but it does not show where the current came from. The evidence does not show that the defendant's wire which broke carried a harmful current, or indeed, any current whatsoever, and the reasonable inference to be drawn from the evidence, in view of the statement of Mrs. Welsh given above, is that the current which caused the accident came from the trolley wire, being communicated to the boy's body through the broken wire of the defendant, the Consolidated Gas Electric Light and Power Company.

As to the Baltimore Electric Company, there is no evidence that this company was in any way whatsoever connected with the injury, and, we believe, the propriety of the ruling of the lower Court as to this company is not questioned.

The plaintiff's contention, as we understand it, is that all that is necessary for him to prove in a case of this kind is, first, that the plaintiff was on a public highway; second, that the defendant's wire broke, and in falling struck him, and, third, that injury resulted. They claim that the doctrine of *res ipsa loquitur* applies under such a state of facts, and that it is not necessary for them to give any further evidence of negligence; that it is not necessary to show what caused the wire to break and fall, or how long it had been down, or whether it broke through a latent defect, or by unusual weather conditions, or whether or not the defect that caused the break was something that could have been discovered or prevented by reasonable care, or whether the wire in question did, or did or not, carry a dangerous current, or for what purpose it was used, or where the current came from that

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injured the boy, or whether or not the defendant maintained a proper system of inspection, or whether accidents of this kind can in all cases be prevented, or any of the surrounding circumstances whatsoever. We submit that this certainly is not the law in Maryland..

This Court has stated expressly in two recent cases when the doctrine of *res ipsa loquitur* will apply. *Benedick v. Potts*, 88 Md. 52; *Strasburger v. Vogel*, 103 Md. 85.

In the case first cited JUDGE MCSHERRY, quoting with approval *Thomas on Negligence*, says: "The doctrine applies to two classes of cases only—First, when the relation of carrier and passenger exists and the accident arises from some abnormal condition in the department of actual transportation; second, where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of persons or property and is so tortious in its quality as, in the first instance at least, to permit no inference save that of negligence on the part of the person in the control of the injurious agency."

This identical language is again repeated in the case of *Strasburger v. Vogel*, 103 Md. 89, and in *Schaeffer v. South Baltimore Car Works*, 96 Md. 106.

The present case, of course, cannot come within the first class defined by JUDGE MCSHERRY, and, we submit, that it is almost equally clear that it cannot come within the second class. The fact proved must, in the language of JUDGE MCSHERRY—"permit no inference save that of the negligence on the part of the person in the control of the injurious agency."

The fact proved in this case is merely that a wire broke and fell on a public highway. Can it possibly be said that this permits of no inference except that of negligence on the part of the person owning and maintaining the wire? It is a matter of common knowledge that wires suspended from poles on public highways often do break, and that even with the highest degree of care on the part of the defendant, it is impossible to prevent the occasional breaking of such a wire. They are exposed to the open air and the action of the ele-

ments. They are necessarily swayed by the winds, made wet and heavy by rain or snow; they contain oftentimes latent defects not discoverable by the greatest care and best known methods of inspection (*City Passenger Railway v. Nugent*, 86 Md. 349), and they are also liable to destruction or injury by the action of third parties, particularly so in a case like this where several companies are using the same pole.

The doctrine for which the appellant contends would, in effect, make electric companies insurers of the safety of their wires, and this the Courts all over the country have repeatedly said is not the case. See also *Light and Power Co. v. Lusby*, 100 Md. 634.

The defendant at the trial below relied largely on the decision in the case of the *Western Union Telegraph Company v. State, use of Nelson*, 82 Md. 313, in which the doctrine of *res ipsa loquitur* was held to apply, but the distinguishing fact is that in the *Nelson Case* the broken wire which caused the injury had been hanging over a public highway, in a broken condition, for a period of at least two weeks. The fact, therefore, which "spoke for itself" in this case was that the defendant had allowed its wire to remain in a broken and dangerous condition over a public highway for a space of two weeks. It must be conceded, under such circumstances, that the defendant either knew, or ought to have known of the dangerous condition of its wire, and, under such circumstances, this Court said that the doctrine of *res ipsa loquitur* applied, but the proof in the *Nelson Case* and in the present case is entirely different. Whereas the *Nelson Case* showed a dangerous condition existing for at least two weeks, the plaintiff here has entirely failed to show anything of the kind. He has not shown that the dangerous condition existed for a single moment before the accident. It may be reasonable enough to hold an electric company liable for injuries caused by a dangerous condition which has existed for two weeks by reason of the breaking of a wire, but it is a very different thing to attempt to hold such a Company liable for every accident caused by such a break, even though the break

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and accident occurred at the same moment of time. See *Schaeffer v. South Baltimore Car Works*, 96 Md. 88.

In *Brymer v. Southern Pacific Company*, 90 Cal. 496, the mere fact of the breaking of a chain was held insufficient.

In *Simpson v. Pennsylvania Locomotive Works*, 139 Pa. St. 245, the unexplained breaking of an emery wheel.

In *Sack v. Dolese*, 137 Ill. 129, the breaking of a brake chain on a car; and in

Duff v. Upton, 133 Mass. 347, the breaking of a derrick.

In all of these cases it was held that proof of the breaking of the appliance in question was not sufficient to send the case to the jury.

Why should there be any stronger presumption of negligence in the case of the breaking of an electric wire? It is true that Courts have held electric companies to a high degree of care in view of the dangerous character of the agency which they use, but the breaking of the appliances in some of the cases above mentioned proved equally disastrous with the results to be expected from the breaking of an electric wire. Thus, in the *Schaeffer Case*, the bolts which broke held a knife blade attached to a cylinder making two thousand revolutions a minute, and the dangerous results of the breaking of the bolts, which would naturally cause the knife blade to fly across the room with great rapidity, may well be imagined.

Brady v. Consolidated Gas Company, 85 Md. 642, was an action against a gas company on account of a death said to have been caused by inhaling illuminating gas which, it was claimed, came from a leaky pipe in the cellar of a dwelling house. Gas, like electricity, is a dangerous agency, both by reason of its poisonous and explosive qualities. There was a break in the pipe, and it was argued that this ought to be sufficient evidence of negligence. The Court, however, adopted the opposite view, commented upon the fact that the cause of the break was not explained by the evidence, and declared that the company could not be liable without actual notice of the existence of the break.

The case principally relied on by the plaintiff below was

that of *Haynes v. Gas Company*, 114 N. C. 206. It is true that some of the language used in that case, when read apart from the facts, would appear to support the plaintiff's contention; but the facts showed that there was not only a broken wire, but a dangerous and improper method of permanent construction in use on a public highway, inasmuch as a guy wire attached to the defendant's pole was so constructed as to be in actual contact with a trolley wire. A permanent condition of this kind as part of the construction adopted and used by the defendant on a public highway undoubtedly presented a clear case of negligence. But see *Western Union Telegraph Company v. Thorn*, 64 Fed. Rep. 291.

In 1 *Lackawanna Legal News*, p. 351, *Hand v. Central Penn. Tel. Co.*, the plaintiff was injured by coming in contact with a telephone wire which was down on a public highway and in contact with an uninsulated guy wire of an electric railway. The Court said it was not shown that the wire was originally faulty, nor that it had remained in place so long that the company ought to have known of its defective condition, and that, therefore, it was not error for the trial judge to withdraw the question of the defendant's negligence from the jury.

In 19 *Texas Civil Appeals*, 631, *Citizens' Ry. Co. v. Gifford*, the lower Court held that it was the duty of the defendant, an electric railway company, to so construct and maintain its wires as to prevent injuries to persons who may come in contact with such wires, and that a failure to so construct and maintain their wires would constitute negligence. This is practically the doctrine for which the appellant here contends. The appellate Court, however, in the case said that the granting of this instruction below was reversible error.

A collection of the cases bearing on this subject will be found in *Joyce on Electric Law*, section 450, and from reading all of the cases it will, we submit, be found that a defendant has been held liable for an injury caused by a broken wire only in cases where the wire had remained in a dangerous condition for such a length of time as to justify the inference

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that a reasonable system of inspection would have discovered it, or, in cases where there was some actual notice to the defendant of the dangerous condition, or some proof of an insecure and dangerous condition of the wire before the break.

It was argued for the plaintiff below that the doctrine of *res ipsa loquitur* is, after all, mainly a question of the burden of proof, and that it would be more reasonable, in view of the fact that the defendant owns and controls its own wires, to put the burden of proof on it to show that the wire did not fall through negligence, rather than to put the burden on the plaintiff to show that it did fall from such cause. This argument seems plausible on its face, but it would work injustice to the defendant in a large class of cases where it is impossible for either party to prove what made the wire fall. The rule would also, we submit, be directly contrary to the rule three times approved by the Court—that is to say, that the doctrine applies only in two classes of cases: First, between common carrier and passenger, and, second, where the act proved permits of no inference save that of negligence. The appellant's argument would, in effect, add a third class of cases, to wit, where the circumstances of the case are such that it is easier for the defendant to get proof of the cause of the happening of the thing proved than it is for the plaintiff to get such evidence. If such a proposition were once admitted, there is no telling how far it would extend. Such a doctrine, were it the law in this State, would certainly have caused many of the cases cited above to have gone to the jury.

Geo. Dobbin Penniman and *Shirley Carter* filed a brief for the Chesapeake and Potomac Telephone Co., appellee.

SCHMUCKER, J., delivered the opinion of the Court.

The question presented by this appeal is a narrow one. It is whether the fact, that a wire of an electric lighting company strung over the public street of a city fell upon and injured a person passing along the street, of itself affords sufficient *prima facie* proof of negligence on the part of the com-

pany to cast upon it the burden of overcoming that presumption.

There is evidence in the record, which for the purpose of this inquiry must be taken to be true, that as the equitable plaintiff, a boy eight years old, was passing along Harford Avenue, a public street of Baltimore City, he swung himself around a pole standing in the pavement, when he came in contact with a hanging wire charged with electricity and badly burned his head and his hand. The evidence does not show the existence of any sudden or unforeseen cause for the falling of the wire, nor show with certainty whether it fell before or at the time of its coming in contact with the boy. He brought this suit for damages for his injury against the appellee and two other companies, all of whom were declared against as owners of the wire, but the appellee admitted at the trial below that it was the owner of, and controlled, the wire, and the case was not pushed against the other defendants.

At the trial in the Court below the case was taken from the jury at the close of the plaintiff's evidence, by the granting of the defendants' prayer, for want of legally sufficient evidence to warrant a recovery. From the judgment for the defendant resulting from that ruling the plaintiff appealed.

The recent widespread adoption of overhead wires upon public streets for the transmission of high tension electric currents for supplying light and power has been followed by numerous injuries to persons who have come in contact with broken and fallen wires. The series of damage suits flowing from these accidents have called for frequent consideration by the Courts of the reciprocal rights and duties of the public and the owners of those dangerous instrumentalities. The Courts agree that outside of any contractual relation the very nature of the business of transmitting such currents along highways imposes upon those engaged in it the legal duty to exercise, for the protection of all persons lawfully using the highways, the high degree of care commensurate with the danger incident to the proximity thereto of the wires charged

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with their invisible but deadly power. *W. U. Tel. Co. v. State, use Nelson*, 82 Md. 293; *Brown v. Edison Electric Co.*, 90 Md. 400; *Newark Elec. Light & P. Co. v. Ruddy*, 62 N. J. L. 505; *Sub. Elec. Ry. Co. v. Nugent*, 32 L. R. A. 700; *Postal Tel. Co. v. Jones*, 133 Ala. 217; *Phelan v. Louisville Elec. L. Co.*, 91 S. W. 703; *Wittleder v. Cit. Elec. & S. Co.*, 50 N. Y. App. 478.

It has been held in different cases that electric companies are not insurers of the public using the streets over which their wires are strung on poles and are therefore not liable for all injuries resulting from contact with their wires irrespective of the circumstances under which they occur. What they are liable for is the exercise of that degree of care which the law imposes upon them in view of the dangerous character of their wires and the rights of the public in the highways over which they are suspended. In *Nelson's Case, supra*, we said, in defining the measure of responsibility of the defendant companies to the plaintiff in the use by him of a highway over which their wires were strung: "The privileges so granted (to the defendant companies) thus to encumber the public highway with appliances so likely to become dangerous to the public safety unless properly employed and controlled, imposed upon them and each of them the duty of so managing their affairs as not to injure persons lawfully on the streets. They owed it to Nelson that his lawful use of the street should be substantially as safe as it was before the telegraph and railway plants had so occupied it. It was their plain duty not only to properly erect their plants, but to maintain them in such condition as not to endanger the public. It follows from this, that if the property of the defendants was not in proper condition and by reason thereof Nelson was injured, these facts alone, in the absence of other evidence to show that the defect originated without the fault of the companies, afford a *prima facie* presumption of negligence. In such cases the doctrine of *res ipsa loquitur* ('a simple question of common sense,' *Whittaker's Smith on Neg.* 423) fairly applies."

It is true that in *Nelson's Case* the wire which did the harm

had been hanging down for about two weeks during at least a portion of which time it had been charged with a current of electricity, but in many adjudicated cases and text-books it has been held that the mere fact that a live electric wire falls down upon a public street over which it has been suspended and injures a person lawfully there, is *prima facie* evidence of negligence on the part of the owner of the wire. *Newark E. L. & P. Co. v. Ruddy*, *supra*; *Hebert v. Lake Chas. I. L. & W. Co.*, 111 La. 522; *Snyder v. Wheeling Elec. Co.*, 43 W. Va. 661; *Denver Con. Elec. Co. v. Simpson*, 21 Col. 371; *Boyd v. Portland Gen. Elec. Co.*, 57 L. R. A. 619; *Thomas v. W. U. Tel. Co.*, 100 Mass. 156; *Jaggard on Torts*, 864; 2 *Cooley on Torts*, 3rd Ed. 1426; *Joyce on Electric Law*, sec. 606; *Elliott on Roads and Streets*, sec. 826.

Some of these authorities rest the position taken by them upon the familiar doctrine asserted in *Scott v. London & St. R. Docks Co.*, 3 Hurlst. & C. 596: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care." The same proposition was asserted in the well-known case of *Byrne v. Boadle*, 2 Hurlst. & C. 722, which was relied on by us in *Nelson's Case*, and was recognized by us in cases for injuries caused by a brick falling from a house abutting on a highway in *Murray v. McShane*, 52 Md. 217; *Decola v. Cowan*, 102 Md. 551; *Strasburger v. Vogel*, 103 Md. 85; and in the case of crossties falling from a moving railway car on which they were being transported in *Howser v. C. & P. R. R. Co.*, 80 Md. 146. The exceedingly dangerous character of live electric wires lends force to the strict application of this rule of law to accidents occurring through contact with such wires when out of proper condition or of their proper place.

In view of the exceedingly dangerous character of electric light and power wires and the peril to which their suspension

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over the public streets exposes the public who constantly traverse and use the streets, we think it both just and reasonable to hold that the injury of a person upon the surface of the street by contact with a hanging or fallen wire of that character, in itself, if unexplained, affords sufficient *prima facie* evidence of negligence on the part of the owner of the wire to entitle the plaintiff to go to the jury in an action for damages for the injury.

In our opinion, the evidence offered by the appellant as plaintiff in the case before us was sufficient to raise such a *prima facie* presumption of negligence against the appellee company as to call for an explanation from it, and therefore sufficient to carry the case to the jury, and that the learned Judge below erred in granting the defendants' prayer. Of course, upon a retrial of the case, the company as defendant will be permitted to rebut the presumption of negligence and show by any lawful evidence, if it can do, that it has fully discharged its duty to the public in the erection and maintenance of its wires, and upon the merits of the case as it shall then be presented the jury can determine.

The judgment appealed from will be reversed and the cause remanded for a new trial.

*Judgment reversed with costs and case
remanded for new trial.*

MARGARET ESTEP ET AL. vs. PHILEMON H. TUCK
ET AL.

Appeal—Delay in Transmission of Record—Costs.

The record on appeal in this case was not transmitted to the Clerk of the Court of Appeals until more than two months after the time prescribed therefor by Code, Art. 5, Sec. 33; and since it is not shown that the delay was caused by the neglect or inability of the Clerk of the Court from which the appeal was taken, or of the appellee, the appeal is dismissed. When certain documents not constituting a proper part of the record are inserted therein at the direction of a third party, he will be ordered to pay the costs of the same.

Decided January 20th, 1909.

Appeal from the Circuit Court for St. Mary's County (CRANE, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS and HENRY, JJ.

H. Arthur Stump (with whom was *Albert R. Stuart* on the brief), for the appellants.

Phil. H. Tuck and *William S. Bansemer*, for the appellees.

WORTHINGTON, J., delivered the opinion of the Court.

In this case a motion to dismiss the appeal has been filed upon the ground that the record was not transmitted to this Court within the time prescribed by Article 5, sec. 33 of the Code of 1904, relating to appeals from Courts of Equity.

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By that section it is provided that: "All transcripts of records on appeals from Courts of Equity, shall be made and transmitted to the Court of Appeals within three months from the time of the appeal prayed."

The appeal in this case was entered on April 15, 1908, and the record was received by the Clerk of this Court on October 1, 1908, or five and one-half months after the appeal prayed.

The cause for the delay is sought to be explained by an affidavit, filed on behalf of the appellants, setting forth certain correspondence that passed between Mr. Farber, attorney for appellants, residing in Baltimore, and the Clerk of the Circuit Court for St. Mary's County, residing at Leonardtown.

From this correspondence it appears that on June 12, 1908, Mr. Farber wrote the clerk, enclosing an agreement or stipulation, signed by himself and Mr. Bansemer, attorney for one of the appellees, as to what the transcript of record should contain.

This letter was received by Mr. Abell, the clerk, on the following day, June 13, 1908.

It further appears that at the time this letter was received, the papers in the case were in the hands of the lower Court, and were not returned to the clerk's office until several weeks later.

In the meantime further correspondence took place between the attorney and the clerk, and in one of the letters that passed between them, dated July 13, 1908, but which was not received by Mr. Abell until July 22, 1908, Mr. Farber, says: "Before making up the record, kindly let me know precisely what you propose to put in it, and before sending it up, kindly let me see it, as I wish to make copies of certain papers for my own files."

The record seems to have been finally completed on September 9, 1908, for it was then forwarded to Mr. Farber at Baltimore for his inspection.

It was returned to Mr. Abell, on September 24, 1908, with instructions from H. B. Stimpson, writing for Mr. Farber,

to eliminate therefrom a certain affidavit of Mr. Tuck, contained therein, and to include certain of the rules of the Circuit Court for St. Mary's County, sitting in equity.

Section 40, article 5 of the Code 1904, provides that no appeal shall be dismissed because the record has not been transmitted within the time prescribed, if it appears to the Court of Appeals that such delay was occasioned by the neglect, omission or inability of the clerk or appellee, "*but such neglect, omission or inability shall not be presumed, but must be shown by the appellant.*"

So far as the affidavit shows, the first letter from Mr. Farber, to the clerk was dated June 12, 1908.

Nearly two months therefore were allowed to pass before any steps were taken by him to have the record made up, and then, before it was made up, the clerk was requested to advise counsel at Baltimore what he intended to put in the record, and to send the transcript to him for inspection before transmitting it to the Court of Appeals.

Neither negligence, omission nor inability is to be presumed against the clerk for not making up the record promptly after the appeal prayed, on April 15, 1908; and the delay, at least until June 12, must be attributed, in the absence of any explanation, to the fault of the appellants.

Subsequently for several weeks, the papers seem to have been in the hands of the Court, but Mr. Farber's request to let him know precisely what it was proposed to put in the record before it was made up, and to send it to him for inspection before it was transmitted to the Court of Appeals, tended further to unduly delay its transmission to this Court.

"Where it is not shown that the failure to transmit the record in time was owing to the omission of the clerk of the Court below, it will be presumed to be the fault of the appellant." *Mason v. Gauer*, 62 Md. 263.

The burden of proof is on the appellants to show some sufficient cause for the unauthorized delay, and they must make it affirmatively appear that such delay was not caused by their own default, but by the neglect, omission or inability

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ity of the clerk or appellee. *Willis v. Jones*, 57 Md. 362; *Ewell v. Taylor*, 45 Md. 573.

The fact that the attorney for one of the appellees on June 12, 1908, signed the stipulation as to what the record should contain does not amount to an agreement for delay in transmitting the record.

If no such stipulation could have been promptly obtained, the appellants had the right to direct forthwith, what papers should be copied into the record and what should be omitted, in order to avoid delay. *Ewell v. Taylor*, *supra*.

For aught that appears in the affidavit the transcript of record could have been made up and transmitted during the first two months after the appeal was taken, had the appellants used due diligence in notifying the clerk what he desired the record to contain.

Having failed to do this, even if they had thereafter exercised the utmost diligence, they might not have been able to repair the loss of time which their laches had already occasioned, and their appeal, coming too late to this Court, could not, under such circumstances, in the face of a motion to dismiss, be entertained.

But much of the further delay in the case was no doubt occasioned by the fact that the attorney in charge of the appeal resided in Baltimore, while the appeal itself was pending at a distance in the Circuit Court of St. Mary's County, so that all communications concerning the matter were necessarily conducted by means of correspondence through the mails.

Had the details of the appeal been left to an attorney of the Court where the case was pending, much of the delay in making up and transmitting the record could doubtless have been avoided.

As it does not satisfactorily appear from the affidavit and correspondence filed with the Court, that by proper diligence a correct record could not have been made up and transmitted in time, the appeal must be dismissed. *Ewell v. Taylor*, 45 Md. 573; *Steiner v. Harding*, 88 Md. 343.

We deem it only proper to say, however, that we have carefully examined the record in the case, as well as the briefs of the counsel, and we are all of the opinion that if the appeal could be entertained the decree of the lower Court would be affirmed.

The affidavit of Mr. Tuck and the agreement between certain parties in regard thereto, form no part of the record on this appeal and were included in the transcript at the request of Mr. George A. Whiting, the purchaser of the mortgaged property, without authority from the appellants. These cover several pages of the record and the cost of copying and printing the same should not be borne by them, but by Mr. Whiting.

Appeal dismissed with costs to the appellees, except as to the cost of copying and printing agreement and affidavit in record which is to be taxed by the clerk of this Court and paid by George A. Whiting.

CATHERINE O. HOFFMAN ET AL. vs. MABEL G.
WATSON ET AL.

*Descent and Distribution—Grandnieces of Deceased Intestate
Entitled to the Exclusion of Cousins—Representation
Among Collaterals.*

When a man dies intestate, seized of real estate which he acquired by purchase, and leaving as his only relations grandnieces and first cousins, the land descends to the grandnieces to the exclusion of the cousins, under Code, Art. 46, sec. 19.

Md.]

Syllabus.

In such case, the grandnieces are likewise entitled to the personal property of the intestate to the exclusion of his cousins, under Code, Art. 93, sec. 127.

Code, Art. 46, sec. 19, in providing for the descent of land of which the owner dies intestate, directs that if the estate was vested in him by purchase, and there be no child or descendant of the intestate, then the estate shall descend to his brothers and sisters of the whole blood, and their descendants in equal degree, equally. Section 21 provides that if there be no brother or sister or descendant thereof, and no father or mother of the intestate, then the land shall descend to the grandfather on the part of the father, and, if he be not living, to his descendants in equal degree. Section 27, directs that in the descending or collateral line, the children of a deceased father or mother shall by representation be considered in the same degree as their parent would have been, "provided that there be no representation admitted among collaterals after brothers' and sisters' children." A man died intestate, without issue, seized of land acquired by purchase, leaving as his only relations two grandnieces, the descendants of his deceased sister, and certain cousins, being children of an uncle of the intestate. *Held*, that under the plain language of section 19, the grandnieces of the intestate, being descendants of a sister, are entitled to the land; that the cousins can only inherit under section 21, which is subordinate to section 19, in the event of there being no descendants of a brother or sister of the decedent; that the proviso in section 27, limiting the right of representation to the children of brothers and sisters, only applies when there are brothers and sisters or nephews and nieces, and does not apply when there are none of these, but only grandnephews or grandnieces; that in such event, these latter take by virtue of being descendants, according to the direction in section 19, by inheritance and not by representation; that the effect of the proviso in section 27 is to prevent grandnieces from sharing with nephews and nieces, these latter taking by representation the shares of their parents.

Code, Art. 93, sec. 126, in providing for the distribution of the personal property of an intestate who shall die without leaving a child or parent, directs that a brother or sister or child or descendant of a brother or sister, shall have the whole.

And section 127 provides that every brother and sister of the intestate shall be entitled to an equal share, and the child or children of a brother or sister of the intestate shall stand in the place of such brother or sister. *Held*, that if there be no brother or sister or child of either, but there is a descendant of a brother or sister, such descendant takes the personal property in preference to any other collateral relations.

Decided January 21st, 1909.

Appeal from the Circuit Court of Baltimore City (ELLIOTT, J.).

The cause was argued at the January Term, 1908, and was re-argued at the October Term, 1908, before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS and HENRY, JJ.

Thomas G. Hayes and Howard E. Cruse, for appellants.

The single question, presented by this appeal, is whether the appellants, the first cousins of James S. Clark, the intestate, who died without any lineal descendant, wife, child or descendant, father or mother, brother or sister, surviving him, take his entire property, both real and personal, to the exclusion of the appellees who are the grandnieces, the children of a deceased nephew of the said James S. Clark. The contention of the appellants, the first cousins, is that they, because of their "*closer proximity of blood*" to the said intestate, James S. Clark, take the whole of his property, to the exclusion of the grandnieces. The grandnieces since the Act of 1820, ch. 191, section 4, now contained in section 27 of article 46 of the present Code, as to real estate, take, if at all, because of their closer degree of kinship to James S. Clark, the intestate, and not by representation, and as the degree of kinship or proximity of blood of the grandnieces to said intestate is more remote than that of the first cousins, the latter, under the Maryland law of descents take the whole of the intestate's real estate to the exclusion of the former.

Md.]

Argument of Counsel.

Certain sections of article 93 of the present Code, as construed by this Court apply the same principle of law to the distribution of the personal property of said intestate, and gives the whole of the personal property to the first cousins when the only claimant is a grandniece. The learned lower Court by its decree gave the grandnieces the whole property, both real and personal of the intestate, to the exclusion of the first cousins, these appellants; and to reverse this decree this appeal is brought.

I. *Mode of Reckoning. Degrees of Kinship:* The law of Maryland declares that the mode of reckoning degrees of kinship of collateral relatives shall be that of the common law in distinction from the mode of the civil law. Article 93, section 134, of the present Code, describes and prescribes this common law mode of reckoning the degrees of kinship of collaterals. This Court has said of this section as follows: "It is evidence to prove relationship within the fifth degree; if it be reckoned by counting down from the common ancestors to the remote, according to the rule presented by the Act of 1798, chapter 101, sub-chapter 11, section 15 (now Code, Article 93, section 134), and that must be adopted whatever was the rule anterior to the passage of that Act." *State v. Greenwell*, 4 G. & J. 415. Under this common law rule of reckoning kinship of collaterals to a given person deceased, there must first be found a common ancestor from whom both of the individuals or classes have descended and then the reckoning is always downwards, and the kinship of the individuals, or the individuals of the two classes to this common ancestor, is their degree of kinship to the deceased person in question.

Blackstone discusses at some length this whole question of the mode and manner of reckoning by the common law the degree of kinship of collaterals. He gives a Table of Descents, showing the degrees of kinship, both on the paternal and maternal side, and thus expresses this rule: "We begin at the common ancestor and reckon downwards, and in whatsoever degree the two persons or the most remote of them is distant from the common ancestor, that is the degree in which

they are related to each other. Thus Titius and his brother are related in the first degree, for from the father to each of them is counted only one; Titius and his nephew are related in the second degree, for the nephew is two degrees removed from the common ancestor, viz, his own grandfather, the father of Titius." 2 *Black. Com.* 206. Applying this rule to the first cousins and the grandnieces, we have the common ancestor from whom the reckoning downwards must be made, the grandfather of the intestate James S. Clark. The degree of kinship of the first cousins, the appellants, to this common ancestor is as follows:

1. From this common ancestor, the grandfather of James S. Clark, intestate, to their father, the brother of the father of the said James S. Clark, one degree.

2. From the father of the appellants to themselves, one degree.

So that the degree of kinship of these first cousins to the common ancestor and hence to James S. Clark, the intestate, is a kinship in the second degree.

Now consider the degree of kinship of the grandnieces, the appellees, to the common ancestor:

1. From the common ancestor, the grandfather of James S. Clark, intestate, to the father of James S. Clark, one degree.

2. From the father of James S. Clark to himself, one degree.

3. From James S. Clark to his nephew, Henry Clark Watson, the father of the grandnieces, the appellees, one degree.

4. From the father of the grandnieces to the grandnieces, one degree.

So that the degree of kinship of the grandnieces to the common ancestor, and hence to James S. Clark, the intestate, is the fourth degree, and therefore, the first cousins are two degrees closer related to the intestate, James S. Clark, than the grandnieces. The fact that the first cousins are of "*closer proximity of blood*" to James S. Clark than the grandnieces must be conceded on the above showing.

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Argument of Counsel.

II. *Descent of Real Estate*: The Maryland law regulating the descent of real estate is Article 46 of the Code. The sections of that Article, relating to the descent of the property involved in this appeal, are sections 19, 21 and 27. The original Act, now embodied in Art. 46 of the Code, was the Act of 1786, chapter 45. By this Act all the descendants of the deceased brothers and sisters of the intestate, took by *representation*. And hence under the terms of this original Act of 1786, chapter 45, if it had not been changed by a subsequent Act, it is conceded that the grandnieces, being descendants of a deceased sister, would take the whole of the property in question by representation to the exclusion of the first cousins. This was settled by this Court in the case of *Maxwell v. Seney*, 5 H. & J. 26. But by the Act of 1820, chapter 191, now section 27 of Article 46 of the present Code, a most material change was made in the law of descent of real estate, that is this Act of 1786, ch. 45. By the Act of 1820, ch. 191, a proviso was inserted into the law of descents of real estate which limited the taking by *representation* to the children of deceased brothers and sisters of the intestate. This put all other collaterals, including grandnieces, except children of deceased brothers and sisters of the intestate, on a par—that is to say, none took by representation, but solely by reason of the proximity of blood or nearness of kinship. This proviso which thus destroyed the taking by representation, with the exception mentioned, occurs in section 27 of Article 46, and is as follows: “*Provided that there be no representation admitted among collaterals after brothers’ and sisters’ children.*” The legal effect of this proviso is to take the appellees, the grandnieces, out of the class of those who take by representation, and place their right to take solely on the ground of proximity of blood or nearness of kinship. It thus must follow that as the first cousins, the appellants, as heretofore shown in this brief, are two degrees nearer related to James S. Clark, the intestate, than the grandnieces, they must take his entire real estate, to the exclusion of the grandnieces. This conclusion is abundantly established by the following Mary-

land cases: *Porter v. Askew*, 11 G. & J. 350; *McComas v. Amos*, 29 Md. 138; *Elwood v. Lannon*, 27 Md. 210; *Garri-son v. Hill*, 81 Md. 211; *Graham v. Whitridge*, 99 Md. 289. Outside of Maryland the same law prevails, and the authorities are given in 14 *Cyc.* 45. This Maryland law, as above given, conclusively shows that these appellants as first cousins to James S. Clark, the intestate, take the whole real estate, to the exclusion of the grandnieces, the appellees, and hence the decree appealed from which gave the whole real estate to the grandnieces is in this respect erroneous.

III. *Distribution of Personal Property*: The right of the appellants, as first cousins, to take the whole of the personal property of James S. Clark, the intestate, under the Maryland law of distribution, if it were possible, is more apparent and conclusively fixed by this law and the decisions of this Court construing the same, than their right to take the whole of the real estate, as heretofore considered and discussed in this brief. The Maryland law as to the distribution of personal property among collateral relatives is given in Article 93 of the present Code. The sections relating to the questions involved are 127 and 129, being sections 129 and 131 of the Code of 1860. Section 127 clearly limits the taking of personal property as to collaterals, by representation, to children of deceased brothers and sisters of the intestate. The language of this section 127 is as follows: "Every brother and sister of the intestate shall be entitled to an equal share, *and the child or children of a brother or sister of the intestate shall stand in the place of such brother or sister.*"

In Section 129 the word "descendants" is used in such an uncertain or ambiguous way as to make this section susceptible of meaning that all the "descendants" of a deceased brother or sister of the intestate take by representation, which would include grandnieces. But this Court in construing these two sections has held that these sections must be construed *in pari materia*. And that as section 127 has so expressly limited the taking by representation to the children of deceased brothers and sisters of the intestate, that in order to harmon-

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Argument of Counsel.

ize the two sections, the taking by representation expressed in section 129 must be limited as expressed in section 127, to children of the deceased brothers and sisters of the intestate. Which construction necessarily excludes grandnieces from taking by representation and places their right to take solely on their degree of kinship to the intestate, and hence they would be excluded in this case. This Court has so construed these sections 127 and 129 in the following cases: *McComas v. Amos*, 29 Md. 128; *Robins v. State*, 1 H. & G. 476, note; *Durall v. Harwood*, 1 H. & G. 474; *Garrison v. Hill*, 81 Md. 211; *Graham v. Whitridge*, 99 Md. 289; *Elwood v. Lannon*, 27 Md. 210. In 14 *Cyc.* 45, cases from other States are given, which decide the same thing as to the status of grandnieces. The above Maryland cases clearly show the decree of the lower Court was erroneous in distributing the personal property to the grandnieces and excluding the first cousins.

W. Baltzell Jenkins and *J. Cookman Boyd*, for the appellees.

Both the grandnieces and cousins are claiming by reason of being "descendants" of kindred specifically named in the 19th and 21st sections, respectively; that is to say, the *grandnieces* being *descendants* of a sister of the *intestate*, and the cousins being *descendants* of the *grandfather* of the *intestate*.

In *Maxwell v. Seney*, 5 H. & J. 27, we find this Court determining at the very outset that under the Act of 1786, chap. 45, grandnieces and great-grandnieces were descendants and did take. Now, what has taken place, or what change has there been in the law since, which declares that grandnieces are no longer descendants of a brother or sister of an intestate, and which thereby prevents them from taking or sharing in the estate at bar?

In Maryland the law of inheritance-descent up to 1786 was governed by the common law, and the common law was regulated by the "canons" of "descent." The common law was then abrogated by the Act of 1786, chap. 45, and from that time up to 1820 the law or doctrine of "representation"

applied to both lineal and collateral "descendants" alike in the *descending line*. *Maxwell v. Seney*, 5 H. & J. 27; *Stewart v. Collier*, 3 H. & J. 289. The Act of 1786, chap. 45, was repealed and re-enacted with amendments by the Act of 1820, chap. 191, and is the law of this State today and known as Article 46 of the Code. As to the amendments of that Article affecting the rights to take of collateral relations more remote than brothers' and sisters' children of the intestate, we find upon examination that section 2 is identical with section 19, Article 46, of the Code of 1888, and section 4 is identical with section 27 of the Code of 1888, with the exception of a proviso attached.

This proviso does not, nor was it so intended, mean that the grandchildren of a deceased brother or sister, in the contemplation of the law of inheritance, are not *descendants*. After the Act of 1820, referred to, containing the proviso of limiting representation, etc., now attached to section 27, Article 46 of the Code, this Court was called upon to decide whether an aunt or cousins would share in the distribution of an estate. L—— died seized of an estate by purchase, intestate and without issue. She left A——, an aunt, and children of uncles and aunts. *Held*, that under the Act of 1820, chap. 191, sec. 4 (now Art. 46, sec. 27), which declares that there shall be no "*representation among collaterals, after brothers' and sisters' children,*" the aunt was entitled to the whole estate to the *exclusion* of the cousins. *Porter v. Askew*, 11 Gill & Johnson, 346.

In *McComas v. Amos*, 29 Md. 139, the proviso was applied to grandnephews and grandnieces, etc., and they with cousins in the *Porter Case*, fell by the wayside, by reason of the presence of nephews and an aunt, respectively.

The Court said in passing upon this restrictive proviso attached to section 27 of the Statute: "And as this proviso was taken from the English Statute of Distribution, of the 22 and 23, Charles II, ch. 10, or rather from the 118th Novel of Justinian, from which the Statute of Charles was mainly copied," etc. And further said: "By all the deci-

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Argument of Counsel.

sions in the Courts of England, our own, as well, brothers and sisters referred to in the proviso have been construed to mean brothers and sisters of the intestate, and that *representation* is not admitted when the distribution *happens to fall among brothers and sisters*. The Court then cites the case of *Porter v. Askew*, 11 Gill & Johnson, 346.

Degrees referred to by this Court in their decisions construing the Laws of Descent and Distribution, do not mean degrees counted either by the common, civil or canon law. 1st. Because the Court has said: "The matter of distribution of an intestate's personal estate is regulated by positive law, and *any* person within the rules prescribed acquires a right of which he cannot be divested, etc." *Rock Hill College v. Jones*, 47 Md. 20. 2nd. Because the relations who take are clearly defined and placed in sections and are classified by Articles 46 and 93, and made so explicit and plain that any layman may understand.

The word *degree* in this connection is *synonymous* with *class*. Each of the sections 19 to 23, inclusive, puts the relations in specific classes, and the relations in that particular class must be exhausted before leaving or going to another more remote class or degree. That is to say, the relations in the 19th section must be exhausted before going to the 20th section.

The United States Circuit Court of Appeals in *Kerr and Parker, Executors, etc., v. Goldsborough*, 150 Fed. Rep. 289, said: "The Act of Congress classified the legatees and distributees with reference to their degree of blood relationship to the deceased, and regulated the taxes to be imposed upon legacies and distributive shares accordingly. In the *first-class* were placed those persons who are found to be the lineal issue or lineal ancestor, brother or sister of the decedent; in the *second-class* are the descendants of a brother or sister of the person dying possessed of property; the *third-class* includes those who may be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother; the brother or sister of the grandfather or grand-

mother; or a descendant of a brother or sister of the grandfather or grandmother constitutes the *fourth-class*, etc.”

It appears from the above decision, that Act of Congress, of June 13, 1898, as amended March 2, 1901, is identical with the laws of Maryland as to classification of legatees and distributees, etc., and use the word class, synonymous with degree.

The appellees submit that they take the personalty under section 127, Article 93 of Code, which reads as follows: “If there be a brother or sister, or child or descendant of a brother or sister, and no child, descendant or father of the intestate, the said brother, sister or child or descendant of a brother or sister shall have the whole.”

First. Because the grandnieces are the only persons in existence who could answer any of the requirements of the description contained in the section just quoted, they being the only “*descendants* of a brother or sister” of the intestate.

Second. Because the use of the word child, followed by the use of the word *descendant*, necessarily means that section 127 is to apply not only to a child but also to a *descendant* more remote than a child of a brother or sister.

Third. Because in this same section, the same use of the word child followed by the word *descendant* is made as to a child or *descendant* of the *intestate*. This section 127 provides that if there be no child or *descendant* of the intestate the word *descendant* meaning *descendants* more remote than children of the *intestate*, then the distribution shall be taken by the child or *descendant* of a brother or sister. The word *descendant* is used in the same sense in section 127, whether applied to *descendants* of the *intestate* or to *descendants* of a brother or sister of the *intestate*.

Fourth. Because in section 128, article 93, which reads as follows: “Every brother and sister of the *intestate* shall be entitled to an equal share, and the *child* or *children* of a brother or sister of the *intestate* shall stand in the place of such brother or sister.”

Here we find the word *descendants* is conspicuously ab-

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Argument of Counsel.

sent and purposely omitted, it being the intention to refer to children only, and not to *descendants* more remote than children. This section 128 disposes of the important question certain to arise whether if there be one child of a deceased brother or sister, and two or more children of another deceased brother or sister, the said children will take by *representation* and not *per capita*.

Impliedly, by this section *descendants* more remote than children of brothers and sisters would take *per capita*. And this construction as to more remote *descendants* was given to section 128 in the case of *McComas v. Amos*, 29 Md. 120; that is to say, this section 128 does not limit the distribution so that it shall not go beyond a child or children of a deceased brother or sister, but only provides that there will be a taking by *representation* instead of *per capita* by the children of deceased brothers and sisters. This decision limiting the word *descendants* to mean children of brothers and sisters is not a decision excluding *descendants* of brothers and sisters more remote than children of brothers and sisters, but decides that the effect of this section 130 depends upon its association with section 128. Under this decision section 130 is supplemental to section 128 in that while section 128 says that the child or children of a brother or sister shall stand in the place of a brother or sister; that is to say, by *representation* or *per stirpes*, section 130 provides that after children of brothers and sisters there shall be no *representation*, and, therefore, that more remote *descendants* than children of brothers and sisters will take *per capita*.

The decision is that living children of brothers and sisters under the two sections 128 and 130 take the whole estate notwithstanding the existence of more remote *descendants*, and this decision was reached after the two sections, 128 and 130, had been so construed as to harmonize, and the section 130 to supplement section 128.

The decision construed the meaning of the word *descendant* relative to sections 128 and 130; it did not include section 127 in its construction of the law—because the Court was not

then called upon to decide the effect of the wording of section 127, but it did imply by the language or the decision that the grandnephews and grandnieces would take in the absence of nephews and nieces, and that decision seemingly treated the wording of section 127 as having the meaning, plain and obvious, ordinarily attached to the words used in said section.

BOYD, C. J., delivered the opinion of the Court.

Inasmuch as the members of the Court who sat at the original hearing of this case differed as to the construction of the statutes involved, a re-argument was ordered before a full Bench which has been heard.

James S. Clark died intestate, unmarried and without any relatives nearer than the appellants, who were his first cousins, and the appellees, who were his grandnieces. He left real estate which he had acquired *by purchase*, and personal property. The question to be determined is whether the cousins or the grandnieces are entitled to the intestate's property, and, as he left both realty and personalty, it will be necessary to consider the two classes of property separately.

1. We will first consider the realty. Section 1 of Article 46 of the Code provides that: "If any person seized of an estate in lands * * * shall die intestate thereof, such lands, tenements or hereditaments *shall descend* in fee simple to the kindred, male and female, of such person, *in the following order*, to wit:" After first providing for the descent to children and their descendants, the statute states the order of succession when there is no child or descendant, in case the estate descended to the decedent on the part of the father, and also when it descended on the part of the mother, and then section 19 provides as follows: "If the estate shall be *vested in the intestate by purchase* * * * and there be no child or descendant of such intestate, then the estate shall descend to the brothers and sisters of such intestate of the whole blood, and their descendants in equal degree, equally." Section 20 provides for its descent to the brothers and sisters of the half blood, and their descendants in equal degree, if there

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be none of the whole blood; and section 21 is as follows: "If no brother or sister of the whole or half blood, or any descendant from said brother or sister, then to the father, and if no father living, then to the mother, and if no mother living, then to the grandfather on the part of the father, and if no such grandfather living, then to the descendants of such grandfather in equal degree, equally."

It requires no argument to show, and it is not, and cannot be denied that if the appellants take at all, it must be under section 21, and likewise the appellees must take, if at all, under section 19. If the statute stopped at section 21 there could be no possible doubt that the appellees would take to the exclusion of the appellants, for they are *descendants* of a sister of the intestate—being granddaughters of his sister, Mary F., who married John Watson, and as the appellants can only claim under section 21, they are by the very language of the statute under which they claim only entitled "if no brother or sister of the whole or half blood, or *any descendant* from such brother or sister" be living. Even then they must show that there is no father, mother or grandfather on the part of the father living before they can have any standing, and then only as "the descendants of such grandfather." It is, so to speak, a condition precedent to the right of cousins to take by descent under the statute, to prove that there was no brother, sister, descendant from such brother or sister, father, mother or grandfather on the part of the father of the intestate living, and hence as the appellees are descendants from a sister of the intestate and are embraced in section 19, the descent must stop there, and cannot get to the appellants under section 21, unless there be some other part of the statute which requires an interpretation that excludes the appellees from the term "descendants," as used in section 19 and in what we have called the "condition precedent" in section 21.

As a general rule the word "descendants" is not limited to "children." In *Levering v. Orrick*, 97 Md. 145, JUDGE PEARCE quoted from 2 *Williams on Executors*, 976, where

under the term "descendants" it is said: "Under this description is comprised every individual proceeding from the stock or family referred to by the testator;" and from 2 *Jarman on Wills*, 632: "Descendants are issue of every degree." But in *Maxwell v. Seney's Lessee*, 5 H. & J. 23, our predecessors, through JUDGE BUCHANAN, held that under the second section of the Act of 1786, ch. 45 (now sec. 19 of Art. 46), as interpreted by the fourth section (which is now sec. 27, without the proviso): "if one of said brothers or sisters die, leaving a grandchild, or any the most remote descendant, as his or her heir at law, such child or descendant is entitled to the same interest in the estate as the ancestor would have been if living, and takes the same *per stirpes* and not *per capita*" (quoting from the syllabus). In that case grandnephews and grandnieces were distinctly held to be "descendants," and a great-grandnephew was permitted by representation, under the statute as it then stood, to share in his father's interest.

But in 1820 our statute of descents was amended, and it is claimed by the appellants that the part of that Act which is now the proviso at the end of section 27 of Article 46, so changed the law of this State as to give first cousins priority over grandnieces. That section is as follows: "If in the descending or collateral line, any father or mother shall be dead, the child or children of such father or mother shall by representation be considered in the same degree as the said father or mother would have been, if living, and shall have the same share of the estate as the father or mother, if living, would have been entitled, and no more; and in such case, when there are more children than one, the share aforesaid shall be equally divided among such children; *provided, that there be no representation admitted among collaterals after brothers' and sisters' children.*" The proviso in italics was added by the Act of 1820 to what was the fourth section of the Act of 1786. In *Maxwell v. Seney*, *supra*, it was said, in speaking of the fourth section, "the office of which is to ascertain who shall be considered as *standing in the same*

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degree, and the proportions to which they shall be respectively entitled." That was in answer to the contention that in the collateral line "only those in equal degree, and none more remote than the children of brothers and sisters can take, and that they must take *per capita*, and not *per stirpes*," which contention the Court refused to sustain.

The fallacy in the argument of the appellants consists in confusing the term "representation" with that of "descent," or "inheritance." If the appellees sought "by representation to be considered in the same degree" as their father, who was a son of the sister of the intestate, so as to participate in the inheritance with other nephews and nieces, an altogether different question would have arisen, but they claim as descendants of a sister of the intestate—there being no sister or brother of the intestate living and no descendants of any such brother or sister who are more nearly related to such brother or sister than they are. It can scarcely be contended that if the appellants were not living, the appellees would not have inherited this property, and they would have inherited it under section 19. That being conceded, as it certainly must be, upon what possible ground can it be said that the appellants, who must take, if at all, under section 21, can exclude the appellees, when the latter section expressly makes their right to inherit subordinate to the rights of those embraced in section 19? That of itself ought to be a complete answer to the appellants' claim.

It is perfectly certain that if the appellees would not have taken under the conditions just stated, the appellants can have no standing in Court. In *Porter v. Askew*, 11 G. & J. 346, it was held that this proviso, in what is now section 27, limited *representation* among collaterals to the children of brothers and sisters of the intestate, and that was repeated in *McComas v. Amos*, 29 Md. 132. In *Porter v. Askew*, it was applied to a case where there were an aunt and first cousins of the intestate. The Court held that the first cousins, who were children of two uncles and another aunt of the intestate who had pre-deceased him, could not take by repre-

sentation and hence Mary Askew, an aunt who survived the intestate, took the whole estate. Now if the proviso in section 27 applies to first cousins as well as to grandnieces, as has been distinctly decided, would it not prevent the appellants from inheriting this estate, if it would the appellees? Undoubtedly it would, and therefore it would seem clear that if the appellees cannot inherit under section 19 by reason of the proviso in section 27, the appellants could not inherit under section 21 by reason of the same proviso, even if the appellees were not in existence, and *a fortiori* cannot so inherit as they are living. We do not mean to intimate that the proviso has such effect, but if it had as to the appellees, it would also have as to the appellants. There is no escape from that conclusion.

We repeat that the appellants can only inherit, if at all, by virtue of section 21. It is not a question as to whether first cousins or grandnieces would take at common law, but the question is which of those two classes take under our Statute. In 27 *Am. & Eng. Ency. of Law*, 316, that proposition, which ought not to require authority to sustain it, is thus stated: "The State statutes generally prescribe the order in which the near relatives of the decedent shall take his property, by a designation of relationship instead of by computation of the degrees of kinship. Most of the statutes fix the order of succession by children and their descendants, the widow and the husband, the father and mother, and the brothers and sisters, *nominatim*. Consequently, it is only where the decedent's property goes to kindred outside this series of especially designated relatives, that the method adopted for reckoning degrees of kinship is resorted to in determining the order of succession." As no one can inherit under section 21 until the classes under sections 19 and 20 are exhausted, and there are those living who can inherit under section 19, we do not understand how it can be said that those embraced in section 21 can displace them. Such a conclusion would not only be contrary to the ordinary rules of construction, but would be in the very teeth of the statute.

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The appellees do not ask that they "by representation be considered in the same degree" as their father would have been, if living, to use the language of section 27, but they ask, as *descendants* of the only brother or sister of the intestate who left descendants, that they be given what section 19 says shall, under such conditions as exist, be their property. They are such "descendants," and, as they are living, they take before those claiming under section 21 which in terms only allows them to take "if no brother or sister of the whole or half blood, or any descendants from such brother or sister," etc., be living.

Taking "by representation" is an altogether different thing from taking by inheritance. The former only applies when a party seeks to be considered in the same degree as a deceased father or mother would have been in, if living. Section 27 does not prohibit grandnephews and grandnieces from inheriting. The construction contended for by the appellants would in effect limit the use of the word "descendants" to that of "children"—so that no one beyond children of a brother or sister of an intestate could inherit. If the Legislature had intended the proviso in section 27 to have such effect, it could have much more easily have said so by using the word "children" in section 19. The Act of 1820 did not attempt to amend section 19, but section 27, and only amended that by limiting the right of *representation* to brothers' and sisters' children. That limitation necessarily implied that it was only in cases where there were brothers and sisters or nephews and nieces because, unless that be so, the proviso was absolutely useless. The only occasion for grandnephews by representation being considered in the same degree as their father or mother would be to enable them to take part in the distribution with those of the same degree as their father or mother. That the Act of 1820 prohibited, but if the grandnieces are the nearest descendants from a brother or sister of the intestate they are not dependent upon representation, but upon the descent which the law has cast upon them as the nearest descendants.

The appellants contend that *McComas v. Amos*, 29 Md. 132, has determined the question in their favor, but we cannot agree with them in that contention. That was a controversy between nephews and nieces on the one hand and grandnephews and grandnieces on the other. Under section 27 the latter, in such case, are undoubtedly excluded. The reason for it is perfectly clear, namely, because nephews and nieces are more closely related than grandnephews and grandnieces, and both are included in section 19, and those in that section most closely related to the intestate take to the exclusion of the others, excepting in so far as section 27 enables them to take by representation, but there is nothing in any part of the statute which can be construed to mean that any included in section 19 are to be subordinated to those in section 21.

JUDGE ALVEY said on this branch of the case: "As to the right of the grandnephews and grandnieces to *share in* the proceeds of the sale of the intestate's real estate, that depends upon the true construction of this restrictive proviso, attached to the twenty-seventh section of the statute just quoted. * * * By all the decisions, our own, as well as those made in the English Courts, brothers and sisters referred to in the proviso have been construed to mean brothers and sisters of the intestate, and that *representation* is not admitted when the distribution happens to fall among brothers and sisters who are remotely related to the intestate. *Porter v. Askew*, 11 Gill & J. 346. And although lineal descendants *ad infinitum* may share in the inheritance of an intestate's real estate, yet upon the received construction of this proviso, as among collateral descendants, except only the instance of the intestate's brothers' and sisters' children, proximity of blood alone gives title to it. And in this case, *there being those in existence* at the death of the intestate of greater degree of proximity of blood to him, *it follows, therefore*, that the grandnephews and grandnieces who made claim in the Court below have no right to share in the inheritance."

We do not at all question that statement of the learned

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Judge, but cannot, as the appellants do, apply the language used by him to a state of facts wholly different from those he was considering and passing upon. In that case, as we have seen, the Court was determining the respective rights of nephews and nieces, who were on one step and grand-nephews and grandnieces who were on a lower step of the ladder of descent, but all of whom were in the classes of heirs included in section 19, if they could inherit at all from the intestate. That section provides that "the estate shall descend to the brothers and sisters of such intestate of the whole blood, and their *descendants in equal degree*, equally." Grandnephews and grandnieces were not "*descendants in equal degree*" with nephews and nieces, and therefore the estate did not descend to them, unless they could by representation stand in the place of their deceased parents, who where nephews and nieces, and consequently in equal degree with the other nephews and nieces. But as section 27 provided "that there be *no representation* admitted among collaterals after brothers' and sisters' children," and they were not children, but grandchildren of the brothers and sisters, of course there could be no representation by them. Nephews and nieces are higher up the ladder than grandnephews and grandnieces, and therefore "proximity of blood alone" gave them title to the real estate, to the exclusion of those descendants of brothers and sisters who were a degree below them in "proximity of blood." That is all that JUDGE ALVEY could have meant, and in our judgment it is all that he said, when taken in connection with the facts he had before him. In stating his conclusion above quoted he said: "And in this case, *there being those in existence* at the death of the intestate of greater degree of proximity of blood to him, *it follows*, therefore, that the grandnephews and grandnieces have no right to share in the inheritance." Is not the necessary implication to be drawn from that statement, that they would have had the right to share but for the nephews and nieces who were in existence? JUDGE ALVEY, in the passage quoted above, was distinguishing between lineal descendants

who may, *ad infinitum*, by representation take, and collateral descendants, who are not admitted by representation beyond brothers' and sisters' children, and of course those beyond that must depend upon "proximity of blood alone," just as he said. The only reason he gave why those grandnephews and grandnieces could not inherit was because there were in existence those of greater degree of proximity of blood, all of whom were included in section 19. Unquestionably, if there had not been nephews and nieces in existence, the grandnephews and grandnieces would have inherited from Dr. Amos, and would have done so under section 19, and cousins, who come under section 21, could have had no standing until all included in sections 19 and 20 were shown to be extinct.

It is not a question whether cousins are more nearly related than grandnephews and grandnieces—that might depend upon how you determine the degrees—but the question is what order *our statute of descents* fixes, and, without violating that statute, you cannot give those embraced in section 21 the right to inherit before those included in section 19. As we have seen, section 1 of Article 46 says the lands, etc., "shall descend in fee simple to the kindred, male and female, of such person, in the following order, to wit." Even a father or mother cannot inherit under section 21 until all entitled under section 19 are extinct; and it must be conceded that nephews and nieces are entitled under the latter, even if it be denied that grandnephews and grandnieces are. The appellants have to go up to the intestate's grandfather, and then down to grandchildren of their grandfather, and they can only do that by virtue of section 21.

We are then of the opinion that the appellees, as grandnieces of the intestate are entitled to the real estate to the exclusion of the appellants, who can only take under section 21, which by its terms is subordinate to section 19, and that all that *McComas v. Amos*, decided was that grandnephews and grandnieces could not share with nephews and nieces, because under section 27 the latter take by representation the shares of their parents, while the former do not. That

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was all that was before the Court affecting this subject, and we are sure JUDGE ALVEY had no intention of determining in that case the rights of classes who take under the statute which were not before him. But the language used by him was unquestionably applied to the facts before the Court in that case, and we have no doubt about the correctness of his conclusion.

In *Garrison v. Hill*, 81 Md. 211, and *Graham v. Whitridge*, 99 Md. 289, cited by the appellants, the controversy in each case was also between nephews and nieces on the one hand and grandnephews and grandnieces on the other. There is no case that we have been able to find which casts the slightest doubt on the right of grandnephews and grandnieces to take where there was no sister, brother, nephew or niece, living at the death of the intestate under such a statute as ours.

2. In the distribution of personalty, after the statute has provided for lineal descent, and that, if there be a father and no child or descendant, the father shall have the whole, section 126 of article 93 provides that, "if there be a brother or sister, or child or descendant of a brother or sister, and no child, descendant or father of the intestate, the said brother, sister or child or descendant of a brother or sister, shall have the whole." It seems to us that there ought to be no doubt about the meaning of that section, when taken in connection with section 127, which is: "Every brother and sister of the intestate shall be entitled to an equal share, and the child or children of a brother or sister of the intestate shall stand in the place of such brother or sister." If an intestate had a brother and a sister, and both were living at the time of his death, each would take one-half of the personalty, exclusive, of course, of the widow's share. If the brother was living and the sister was dead, but left one child surviving her, then, under section 127, the brother and the child of the sister would each take one-half. Or, if the brother had died without leaving a child and the sister left a child, then such child would take the whole. But if neither of them left

children, but one left a grandson, then the grandson, who would be a grandnephew of the intestate, would take the whole. Section 126 says: "The child or descendant of a brother or sister shall have the whole." That does not limit the distribution to a "child," but to a "*child or descendant*," and must mean that if there be no brother, sister, or child of a brother or sister, but there is a descendant of a brother or sister, such descendant would take before any other collateral relations, excepting in so far as section 128 provides for the mother taking a share under certain conditions. The case of *McComas v. Amos*, 29 Md. 120, is supposed to be contrary to that conclusion, but we do not find it so. There JUDGE ALVEY had under consideration what are now sections 127 and 129 of Article 93. He said that the word "descendants," as used in section 129 (section 131, Art. 93, Code 1860, which he was referring to), was construed to mean children of such brothers and sisters, but he did not construe the words "or child or descendant of a brother or sister" in section 126 to mean child alone, in determining who was to take. He was in that case, as in the later case on page 132, considering the rights of nephews and nieces on the one side, and grandnephews and grandnieces on the other, and not, as in this case, whether grandnieces are to be excluded from distribution by cousins. There is no case in this State in which the precise question now before us was passed on or considered, and, after a careful investigation of the decisions in other States, we have found none that sustain the contention of the appellants. There are cases which hold, as *McComas v. Amos* did, that under a statute such as ours, nephews and nieces take to the exclusion of grandnephews and grandnieces, but in none of them have we found any intimation that, where there are no brothers or sisters or nephews or nieces, grandnephews and grandnieces do not take.

If there had been no cousins, it would scarcely have been contended that the appellees would not have been entitled to the estate, as we have already said in reference to the realty.

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Section 129 of Art. 93 is: "*After children, descendants, father, mother, brothers and sisters of the deceased, and their descendants*, all collateral relations in equal degree shall take, and no representation among such collaterals shall be allowed; and there shall be no distinction between the whole and half blood." This section and section 126 would seem to make the case as to the personalty even stronger than that of the realty, as section 126 expressly says, "*child or descendant of a brother or sister*" and section 129 in terms postpones such collaterals as the appellants, to take after "*brothers and sisters of the deceased and their descendants.*" In *Shriver v. State*, 65 Md. 285, JUDGE MILLER, in speaking of a brother (James) of the intestate, said: "The *onus* is upon the plaintiff to show that James died before the intestate, leaving no children or *descendants*, and if he fails to show this he can recover only one-fourth."

As the appellees are entitled to distribution under section 126 of Article 93, we are unable to understand upon what principle those who claim under other sections, which only confer rights after those in section 126 are extinct, can displace the latter. The statute seems to us to clearly give the right of distribution to the grandnieces in preference to the cousins.

3. We do not deem it necessary to further prolong this opinion by discussing the degrees of relationship at common law, as we have already sufficiently expressed our views on that subject, but we do not want to be understood as agreeing with the appellants as to the relationship of these parties. The appellants claim as descendants of the grandfather of the intestate, while the appellees claim as descendants of a sister of the intestate. If, therefore, we did undertake to determine the degrees of relationship we could not properly do so by taking the grandfather as the common ancestor. But we prefer to base our decision on the interpretation of the statutes, and are of the opinion that although grandnephews and grandnieces cannot take when there are nephews and nieces, because of the proximity of blood of the latter as com-

pared with the former, when there are no nephews or nieces the grandnephews and grandnieces do take as descendants of a brother or sister of the intestate to the exclusion of cousins, because the latter cannot take until those in prior sections (19 of Article 46 and 126 of Art. 93), which include grandnephews and grandnieces, are shown to be extinct.

We are, for the reasons given, of the opinion that the decree of the lower Court must be affirmed, both as to the realty and personalty.

Decree affirmed, the appellants to pay the costs, above and below.

BRISCOE and SCHMUCKER, JJ., dissented.

WORTHINGTON, J., concurred and filed the following opinion:

It seems to me too plain for argument that where lands are acquired by purchase the only way in which the first cousins of the intestate can, in this State, inherit from the intestate, is under section 21 of article 46 of the Code of 1904, which reads as follows:

SEC. 21. "If no brother or sister of the whole or half blood, *or any descendant* from such brother or sister, then to the father, and if no father living then to the mother, and if no mother living, then to the grandfather on the part of the father, and if no such grandfather living, *then to the descendants of such grandfather in equal degree, equally.*"

Now first cousins are descendants of a common grandparent and it is only by reason of their being such *descendants that they* are entitled to share in the inheritance, under the Statute to Direct Descents.

Section 19 provides for brothers and sisters of the intestate, of the whole blood and their descendants.

Section 20 provides for brothers and sisters of the intestate, of the half blood and their descendants.

Section 21 provides for *other collateral descendants after the collateral lines under the two preceding sections are exhausted.*

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The word "descendants" means descendants to "the remotest degree." *Maxwell v. Seney*, 5 H. & J. 25. This is the plain reading of the statute and argument as to its proper construction would seem to be wholly unnecessary.

It is contended, however, that this Court has construed the law differently, and the case of *McComas v. Amos*, 29 Md. 140, where it is said that "there being those in existence of a greater degree of proximity of blood, the grandnephews and grandnieces * * * have no right to share in the inheritance," is cited to support this contention.

But in that case the Court was dealing with a *proviso* in regard to *representation*, and not with the general rules of inheritance.

This is made perfectly clear by the reference in this opinion written by JUDGE ALVEY, to the case of *Maxwell v. Seney*, 5 H. & J. 23, where it was said that: "If a nephew be dead leaving a child, that child is considered by *representation*, in the same degree as his father would have been, if living, and so on, *ad infinitum*." In the same case the Court said that the rule of representation before the Act of 1820, ch. 191, applied to the descending or collateral line, "*in any the remotest degree*." The Act of 1820 contained a *proviso* as to *representation*, but did not change the law of inheritance.

The words "proximity of blood alone gives title," as used by JUDGE ALVEY, applied to the case then in hand where the contest was between nephews and nieces and grandnephews and grandnieces. As between these proximity of blood alone gives title, because there is, since the Act of 1820, no representation among collaterals beyond brothers' and sisters' children, and the grandnephews and grandnieces were excluded by the existence of nephews and nieces.

As to personal property Art. 93, section 126 of the Code of 1904, in my judgment controls. That section is as follows:

Section 126. "If there be a brother or sister, or child or descendant of a brother or sister, and no child, descendant

or father of the intestate, the said brother, sister, or child or *descendant* of a brother or sister shall have the whole."

Here again by sections 127 and 129 no representation amongst collaterals is allowed, beyond brothers' and sisters' children.

No effort on my part to elucidate these provisions of the Code could improve on the admirable opinion delivered by BOYD, C. J., in this case, and without attempting to review the former decisions of this Court in regard to the subject, none of which decisions could change the plain language of the statute, and none of which attempt to do so, I think the decree of the lower Court, in this case, is entirely right and is properly affirmed.

(Filed January 22nd, 1909.)

JOHN H. MORGAN AND FRANK B. SMITH, RE-
CEIVERS OF THE MARYLAND STORAGE
COMPANY vs. FAIRFAX S. LAND-
STREET.

*Corporations—Subscriber to Capital Stock Not Liable Until
Whole Amount Is Taken—Waiver of This Condition.*

When the number of shares and the amount of the capital stock of a corporation are fixed by its charter, a subscriber to the shares of stock is not liable on his subscription until the whole number of shares have been unconditionally subscribed. A subscriber to the original capital stock of a corporation does not waive the defence that all of the stock was not taken by making his subscription at a time when he knew that the corporation was already engaged in business in a small way without having all of its stock subscribed for, but when a

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larger business was then contemplated, and when, although he was elected a director, he never qualified as such, or attended a meeting of the directors or stockholders, and did not participate in the business carried on by the corporation.

Decided January 20th, 1909.

Appeal from the Circuit Court for Baltimore County (BURKE, C. J.).

Plaintiffs' 1st Prayer.—The plaintiffs pray the Court to instruct the jury that since it appears from the uncontradicted evidence in this cause that the Maryland Storage Company of Baltimore City, on June 10, 1907, and for nearly a year previous thereto, was engaged, to the knowledge of the defendant, in carrying on an active warehouse business, and had incurred and was incurring liabilities; and that the said company's capital stock, to the knowledge of the defendant, had not been fully taken or subscribed for, it therefore follows that the fact that all of said capital stock was never taken is no defense to this action; and if the jury find from the evidence (1) that the defendant signed the subscription agreement dated June 10, 1907, and offered in evidence, to \$30,000 of said company's capital stock; (2) that personal demand was made by said company upon the defendant for the payment of his said subscription more than ninety days before the institution of this suit; (3) that the defendant did not pay the same, and (4) that the plaintiffs are the receivers for said company, that in this event the plaintiffs are entitled to recover against the defendant to the extent of his said subscription. (*Rejected.*)

Plaintiffs' 2nd Prayer.—That since it appears from the uncontradicted evidence in this cause that the Maryland Storage Company was incorporated on or about November 18, 1904, with an authorized capital stock of \$150,000, divided into 3,000 shares of the par value of \$50 each; that the company organized by the election of directors and officers on or about December 12, 1904, that thereafter, in July, 1906, the

said company's capital stock was duly increased to \$250,000, divided into 5,000 shares of the par value of \$50 each, and that the defendant's subscription (if the jury find said subscription) was to said increased capital stock, it therefore follows that the fact that all of said capital stock was never subscribed is no defense to this action, and that if the jury find from the evidence (1) that the defendant signed the subscription agreement dated June 10, 1907, and offered in evidence, to \$30,000 of said company's capital stock; (2) that personal demand was made by said company upon the defendant for the payment of his said subscription more than ninety days before the institution of this suit; (3) that the defendant did not pay the same, and (4) that the plaintiffs are the receivers for said company, that in this event the plaintiffs are entitled to recover against the defendant to the extent of his said subscription. (*Rejected.*)

Plaintiffs' 3rd Prayer.—That if the jury find from the evidence that the defendant, on or about June 10, 1907, signed the written subscription offered in evidence, to \$30,000 of the capital stock of the Maryland Storage Company, and that at the time of making said subscription the said company, to the knowledge of the defendant, had been engaged in an active warehouse business since on or about July 1, 1906, and had incurred and was incurring liabilities, and that the defendant also knew that the company's capital stock had not been fully taken and subscribed for, that in this event the jury are instructed that the fact that all of said capital stock was never taken is no defense to this action, but that the plaintiffs are entitled to recover against the defendant to the extent of his said subscription, provided the jury further find from the evidence that personal demand was made by said company upon the defendant for the payment of his said subscription more than ninety days before the institution of this suit, that the defendant did not pay the same, and that the plaintiffs are the receivers for said company. (*Rejected.*)

Plaintiffs' 4th Prayer.—That if the jury find from the evidence that the Maryland Storage Company was incorporated

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on or about November 18, 1904; that the plaintiffs are the receivers for said company; that the defendant on or about June 10, 1907, signed the written subscription offered in evidence, to \$30,000 of the said company's capital stock, and that at the time of making such subscription the defendant knew: (1) that the said company on or about July 1, 1906, had commenced and had since been prosecuting an active warehouse business under the contract with the Western Maryland Railroad dated June 12, 1906, and offered in evidence, of the contents of which contract the defendant had knowledge; (2) that the company was about to begin the construction of a warehouse upon its property at York and Johnson Streets; and (3) that the capital stock of the company had not been fully taken and subscribed for; and if the jury further find from the evidence that upon or after making his said subscription the defendant consented to become a director in said company, and acquiesced in his election as such director, knew that the company was continuing to carry on its business and was incurring liabilities; learned that it had contracted for and started to erect a warehouse upon its property; advised the company's Vice-President and General Manager with regard thereto; visited the said property in the fall of 1907, and examined and approved the work there being done upon the warehouse; consented to assist said company in raising funds for the completion of said warehouse, and about August or September, 1907, promised to make payments on account of his said subscription; and if the jury further find from the evidence that at the time of each and all of the transactions mentioned above (if the same are found by the jury), the defendant knew that the said company's capital stock was not fully subscribed for, that in this event the jury are instructed that the fact that the entire capital stock of said company was never subscribed is no defense in this cause, and the plaintiffs are entitled to recover against the defendant to the extent of his said subscription; provided the jury find from the evidence that personal demand was made by said company upon the defendant for the

payment of his said subscription more than ninety days before the institution of this suit, and that the defendant did not pay the same. (*Rejected.*)

Plaintiffs' 5th Prayer.—That if the jury find from the evidence that the plaintiffs are the receivers of the Maryland Storage Company; that the defendant signed the subscription agreement dated June 10, 1907, offered in evidence, and that personal demand was made upon the defendant for the payment of his said subscription more than ninety days prior to the institution of this suit, then the verdict of the jury must be for the plaintiffs, even though the jury also find that the whole authorized capital stock of the Maryland Storage Company was not subscribed; provided the jury further find that the defendant knew that all of said capital stock was not subscribed for, and with such knowledge participated in the affairs of the company in a way which could only properly be done upon the assumption that the subscribers intended to proceed with the stock partially subscribed. (*Rejected.*)

Defendant's 2nd Prayer.—The Court instructs the jury that if they find from the evidence that the stock of the Maryland Storage Company authorized by its charter, to wit: Three thousand shares, at fifty dollars a share, was never fully subscribed, then, even though they find that the defendant signed and delivered the subscription paper offered in evidence, as stated by witnesses for the plaintiff, their verdict must be for the defendant, unless they further find that after such subscription and with knowledge that said capital stock had not been fully subscribed the defendant participated in the conduct of the business of the said company in such a way as to indicate that he consented to and acquiesced in the company's proceeding in its business before the whole amount of said stock was subscribed, and the jury are further instructed that even if they find that the defendant, after knowledge that said stock was not fully subscribed, consented to become a director. but did not act as such, and promised to pay part of his subscription, such facts do not amount to such partici-

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pation in the business of the company as would make the defendant liable under such subscription. (*Rejected.*)

Defendant's 3rd Prayer.—And further prays the Court to instruct the jury that so much of the second alleged amendment to the charter of the Maryland Storage Company, dated July 20th, 1906, as undertakes to increase the number of authorized directors of said company from nine to twelve is void, and conferred no power upon said company to select or have more than nine directors, and it being undisputed that said company had nine other legal directors at the time of the attempted election of defendant as one more, and that defendant never acted as such, then defendant never became a director of said company, either in law or fact. (*Rejected.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, THOMAS, WORTHINGTON and HENRY, JJ.

Joseph C. France and *Stuart S. Janney* (with whom were *A. C. Ritchie* and *Gibson & Smith* on the brief), for the appellants.

1. The defense depended upon by the appellee is based upon the well-known principle that when the charter of a corporation fixes the amount of its capital, the law implies a condition in subscription to its formative stock, that the amount fixed in the charter shall be raised before the corporation creates any liabilities, and that a subscriber may depend upon a violation of the condition as a defense to an action on the subscription agreement. The cases where this Court has recognized the defense and defined its application are as follows: *Hughes v. Antietam Manufacturing Co.*, 34 Md. 332; *Hager v. Cleveland*, 36 Md. 476-491; *Fiery v. Emmert*, 36 Md. 474; *Garling v. Baechtel*, 41 Md. 305; *Stillman v. Dougherty*, 44 Md. 384; *Morrison v. Dorsey*, 48 Md. 461; *Musgrave v. Morrison*, 54 Md. 164; *Gettysburg National Bank v. Brown*, 95 Md. 367.

The recognition of this defense is a relaxation for the pro-

tection of investors of the well-known doctrine that the stockholders' liability in an insolvent corporation constitutes 'a trust fund for the creditors. The equities of the creditors being generally considered superior to those of stockholders, who take their chance of large profits and must be held to have assumed a corresponding risk of loss. *Cook*, Vol. 1, sec. 166.

The Courts, therefore, are careful to confine the privileges of the defense to deserving defendants, and will not extend them to those whose rights have not been invaded by the premature start of the corporation, and who are merely seeking to dodge the stockholders' liability. "The defense was intended to protect subscribers who in good faith objected to the organization of a company when its capital stock which was necessary to the enterprise had not in fact been taken, but it was never intended and Courts will never permit it to be used as an instrument of fraud." *Morrison v. Dorsey*, 48 Md. 461.

It is a mere presumption that the condition of full subscription exists, founded upon the probable understanding of the parties. The matter involves no question of public policy and the Courts will never presume the presence of the condition when the facts show it could not have been the mutual understanding. For example, the whole theory being founded upon a presumption that the subscriber depended upon the corporation raising the amount of stock fixed in the charter or subscription agreement. The defense has no application where the amount of capital is not fixed therein. *Kennebec & Portland R. R. Co. v. Jarvis*, 34 Me. 360; *Warwick R. R. Co. v. Cody*, 11 R. I. 131; *Hambleton Co. v. Rice*, 7 Barb. Sup. Ct. (N. Y.) 157-166; *Lynch v. E. I. & M. R. Co.*, 57 Wis. 432; *Hager v. Cleveland*, 36 Md. 491.

Nor does it arise where the charter expressly authorizes the corporation to start before all of the stock is subscribed. *Morawetz, Private Corp.*, Vol. 1, sec. 138.

By analogy and in reason it also follows that if the corporation is already a going concern at the time of the subscrip-

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tion and has already created and is continuing to create liabilities to the knowledge of the subscriber, and the subscriber also knows that its stock fixed in its charter is not fully subscribed, the presumption cannot arise "that the amount fixed in the charter shall be raised before the corporation creates any liabilities." That would be a foolish presumption, for the contrary is already the fact.

This Court has in a dictum already expressed itself on the point, in the case of *Musgrave v. Morrison*, which was a similar suit to the one at bar. It was here proved that the defendant knew at the time of his subscription that the corporation was engaged in active business, and that its stock was not fully subscribed, and the Court said: "Under these circumstances it might well be argued that his subscription was not made upon the condition that the company was not to organize until the whole number of shares had been taken." *Musgrave v. Morrison*, 54 Md. 164.

It is true that the Court did not rest its decision upon that ground. As there was conclusive evidence of an estoppel, even if the condition had ever existed, it was not necessary to do so. It is for this reason that the defense is never allowed where the subscription is to increased stock and not original stock. *Gettysburg Bank v. Brown*, 95 Md. 386-7. For when increased stock is in question the corporation must have been a going concern before the subscription, and the presumption does not arise. *Morawetz, Private Corpr.*, Vol. 1, sec. 142.

In the case at bar at the time of the appellee's subscription, the Maryland Storage Company had been for a year engaged in active business, with receipts of \$1,500 a month, under a contract negotiated by the appellee binding it to pay a rental of \$500 a month and to construct a warehouse at York and Johnson Streets. The appellee admits that he was perfectly familiar with that fact, and with all the business conducted by the company. He also admits that he knew at the time that the company's capital stock was not all subscribed. His first connection with the company as subscriber (unlike the case of the subscriber in *Bank v. Brown*), took place at a time

when the company was, to his knowledge, actually engaged in business.

Under such circumstances it approaches the frivolous to say that "it is presumed that capital, to the amount fixed in the charter, would be raised before the corporation created any liabilities." He knew such liabilities already existed and that the capital was not raised. The only case where this point is directly treated is *Arkadelphia Mills v. Trimble*, 54 Ark. 519. See also *Nutter v. R. R. Co.*, 72 Mass. 85.

2. The evidence was legally sufficient to show a waiver of any defense of partial subscription.

Landstreet did not actually sign the subscription until June 10, 1907. But he personally bound himself to subscribe in February, 1905, and his interest in the company and participation in its affairs may be regarded in the light of that fact.

What are the acts showing this consent and acquiescence?

As a prospective subscriber, and with Timanus' letter before him, saying he was delaying financing the company until an agreement with the Western Maryland Railroad Company was signed, he negotiated the agreement of June 12, 1906, which bound the company to a monthly rental of \$500 and to an active business requiring capital, and to the construction of a warehouse. It is moderate to say this was an acquiescence in the company's proceeding with its business. He was starting it, and he knew its condition.

When he voluntarily subscribed, he knew that the company was already in business and under large liabilities. This was a very practical acquiescence in the start that he knew had been made.

When talking to Brady, he advised him to go along with the contract as it then existed, and not to undertake any further enterprise. This was an acquiescence in the liabilities that had been incurred, with which he was familiar, and in a continuance of them.

When he subscribed, his understanding was that the company was to borrow money for its building on his subscription. If he regarded his subscription as conditional, this was

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a great wrong upon the proposed lender, and if he did not so regard it, the liability sought to be enforced is no greater than what he intended to undertake. This understanding is in itself clear evidence of his consent that the company should borrow the money, which is to create liabilities.

He visited the building when it was under way and congratulated President Timanus on the showing. This was an acquiescence in what had been done.

He then promised to send \$5,000 on account of his subscription. This was a very encouraging acquiescence.

He accepted an election as director. Will directors be allowed to set up their omission to attend meetings as a defense to their subscription agreement?

He agreed to intercede with the Western Maryland Railroad Company to have them lend money to the company to enable it to complete the building.

He then showed his consent that the company should continue to proceed with its business.

During all of this time the appellee knew that the corporation's capital was only partially subscribed.

It is submitted that each of the above segregated facts would be legally sufficient to indicate his consent to the company's operations. Their accumulated force is sufficient to show not only an acquiescence in what was done, but that he was one of the moving spirits in the enterprise. And it is not strange that when called upon to pay his money he never thought of the possibility of making the defense now insisted upon, but set up an alleged private understanding with Brady. It is respectfully submitted that the lower Court erred in ruling *as a matter of law* that the defendant had not waived the defense of partial subscription.

3. The appellee is estopped from setting up the defense of partial subscription.

At the time of signing the subscription agreement the appellee knew that the corporation was in a position where it would become financially responsible upon its failure to carry out the terms of the agreement of June 16, to comply with

which it had given or was under obligation to give a heavy bond. He knew that it was employing the funds of other stockholders in doing business under that agreement, and that it would employ more of these funds of other stockholders if it carried out such agreement, or would defraud creditors if it did not use such money. He knew that its stock was not fully subscribed, and put his name to the unconditional subscription for the express purpose of getting others to subscribe and pay, and his subscription was used as he had authorized, for the purpose of inducing others to subscribe, and also to pay their subscriptions.

His subscription was used as the basis for the action of the board in contracting for the construction of the warehouse by the Hopkins-Barnett Company, and therefore on the faith of it their money was spent in labor and materials, and while two-thirds of his subscription would have paid the company's indebtedness, he declined to pay.

To allow this defense in a case of this character will not only open the way to future frauds, but a present and very oppressive hardship will have been visited upon the other subscribers who paid their money on the faith of these acts, and on creditors who trusted the corporation.

This Court, in treating of verbal agreements and private understandings in connection with stock subscriptions, has said: "The defendant putting upon paper an unconditional promise to pay may have induced others not only to subscribe, but to pay, and his attempts now to shield himself by his private understanding may be a fraud upon others who have thus been induced to subscribe and pay." *Scarlett v. Academy of Music*, 46 Md. 122.

In the case at bar the elements are proved which in the *Academy of Music Case* are suppositions. This appellee *did* subscribe unconditionally, *for the purpose* of inducing others to subscribe and pay. By so doing, others were thereby induced to subscribe and pay. Having stood in position to take the profits if the enterprise was successful, he would now avoid all liability upon its failure, and that by a legal fiction

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which he never thought of, but which skillful counsel have evolved for his protection.

The receivers in this case represent the stockholders, as well as the creditors of the Maryland Storage Company, and it is respectfully submitted that the appellee will not be permitted to commit this grievous wrong upon them and then step aside and let the weight of his actions rest upon other shoulders, but he will be held to be estopped by his actions from setting up the defense of partial subscription.

Counsel for the appellee argued below that the condition which is implied in a contract of subscription is not as heretofore believed that the corporation shall not embark in its business before its stock is fully subscribed, but quite different from that, to wit, that the subscriber shall not be called upon to pay his money until the full amount of capital stock is taken. That he can only be deprived of this defense by the actual casting of votes in favor of the company's business, or the creation of its liabilities, or by participation in the corporate affairs *within the corporation*, meaning thereby as an officer or director and in such capacity.

The appellants submit that even measured by the erroneous standard thus contended for, the liability of the appellee in this case would be for the jury, there being evidence *legally sufficient* to show the character of participation mentioned. But the argument is fallacious and the fallacy consists in mistaking the result of the condition when implied and not waived for the condition itself.

A corporation with its capital fixed in its charter is not authorized to incur liabilities in the course of its business until all of its stock is taken, as the subscribers are presumed to have subscribed with reference to the amount named in the charter as a minimum. To violate this principle is to violate an implied condition of the subscription, and *the result* is that the subscriber is not liable for calls unless he has consented to or acquiesced in the corporation's proceeding with its business. *Morawetz, Private Corporations*, sec. 149; *Gettysburg Nat. Bank v. Brown*, 95 Md. 386.

The converse of the proposition has frequently been ruled upon and demonstrates this. Thus it is clear that if a corporation is authorized by its charter to begin the prosecution of its business before all of its capital stock is taken, the subscribers cannot have subscribed with reference to any particular amount of capital, and the result is that they will be liable to be called upon to contribute to the extent of their undertakings. *Morawetz, Private Corp.*, sec. 138.

This Court has made the true condition clear in the last opinion heretofore quoted: "It is not to be supposed that a reasonably prudent person will invest in a corporation which is not to be supplied with sufficient capital with which to prosecute its affairs, and therefore it is that a presumption arises that the amount fixed in the charter shall be raised before the corporation creates any liabilities."

And, again, the waiver of the condition may be shown by acts indicating that the subscriber has consented to the company's proceeding with its business before all of its stock is subscribed. *Gettysburg Nat'l Bank v. Brown*, 95 Md. 386.

That the condition may be waived by acts or declarations either prior or subsequent to organization has also been decided in this State. *Fiery v. Emmert*, 36 Md. 474.

The same contention here made was made in a Minnesota case, and the Court's treatment of it is apposite and enlightening. The Court said: "A subscriber may waive the defense that the full capital stock of the corporation has not been subscribed. This waiver may be either express, or implied from the acts or declarations of the subscribers. The appellant claims that the waiver must amount to an estoppel; the respondent, that acts or declarations of a subscriber showing an intent not to object that the full stock has not been subscribed are sufficient, although a technical estoppel may not be shown. Some of the cases cited use the word 'waived.' others the word 'estopped.' An estoppel *in pais*, as the word is usually employed and applied, includes the fact that the party claiming the estoppel relied upon and acted upon the acts or declarations, so that he will be prejudiced if the other

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party is not held to them. We do not find that the cases referred to using the word 'estopped,' and holding that the subscriber was or was not estopped, use the word in this sense. So in *Hager v. Cleveland*, 36 Md. 476; *Garling v. Baechtel*, 41 Md. 305 (and others cited), the Courts, in stating what will estop the subscriber, or prevent his being heard to make the objection, refer only to his acts, and do not include the fact that they did influence others. If a technical estoppel were required to prevent a subscriber withdrawing his subscription on the ground that the full stock has not been subscribed, much fraud might be permitted * * * The safer rule is that if his acts are of such a character that either the corporation or subscribers may have been induced by them to act, and will be prejudiced if he be permitted to withdraw, he shall be held to have waived, or be estopped to assert the defense." *Masonic Temple v. Channel*, 43 Minn. 353.

The results of the adoption of the theory of the appellee would be disastrous. It would create a crowd of *dormant* subscribers, who might be held out to the world as such; credit might and would be procured on their names; they might encourage and advise the officers in the conduct of the corporate affairs, and, carefully keeping the full amount of stock from being taken, and being also careful not to have any official connection with the corporate management, they would be in position to take up the profits accruing to them as stockholders in the event of success, and, in the event of failure, snap their fingers at stockholders who subscribed on the faith of their subscription and who paid their money when called upon, and at creditors, who relied upon the standing their subscriptions gave the company and gave it credit.

Benjamin A. Richmond and *Edgar H. Gans* (with whom was *J. F. C. Talbott* on the brief), for the appellee.

There was nothing in the nature or kind of business of the storage company, or in its situation, which would deprive the appellee of the benefit of the condition of his subscription.

Its certificate of incorporation states that it is formed for the purpose of carrying on a forwarding and warehousing business in this State, and for the construction, owning, chartering or leasing of steamboats, wharves, docks, roads, vehicles or other property required for the purpose of such forwarding and warehousing business, and for the buying, selling, mortgaging, leasing, improving, disposing of, or otherwise dealing in lands in this State, etc. These powers are very broad, and contemplated the doing of several things, some of which might require but little capital, and some of which would require a large amount of capital, depending upon the will of the company. In this case it appears that the storage company from the very start contemplated expending its whole capital in these enterprises, and not merely a part of it. It began doing some business on July 1, 1906, at Brown's wharf, a place which it had leased from the Western Maryland Railroad Company on June 12, 1906. But at that time it contemplated the expenditure of a large amount, if not all, of the money realized from its whole capital stock, for by the second paragraph of this lease, it agreed to construct a modern warehouse for the storage of merchandise and to commence the same forthwith, and to endeavor to complete the same on or before the first day of January, 1907. This, then, was the main object and purpose of its incorporation, and especially of its purpose to get together a capital of \$150,000. It required little or nothing in the way of capital to merely rent Brown's wharf and carry on a little storage business there, but it required a large capital to construct this warehouse.

When, therefore, having in the meantime done nothing toward this building, Mr. Brady, on behalf of the storage company, came to appellee in June, 1907, and got the subscription now sued on, there was nothing in the kind of business contemplated by the company which would rob this subscription of the rule of the condition therein which has been applied by this Court in *Hughes' Case*, 34 Md.; *Cleveland's Case*, 36 Md.; *Garling's Case*, 41 Md., or the *Gettysburg*

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Bank Case, in 95 Md., or which has been applied in the many other cases. Some of these were corporations for the putting up of buildings, such as hotels, warehouses; some for the building of railroads, and so on. Taking the object and purpose of the storage company as manifested by its board of directors, the principal one of which was the erection of a costly building, there is nothing to distinguish this corporation in *kind* from the other corporations in Maryland and elsewhere, to which the rule has been applied.

In *Musgrave's Case*, 54 Md. 164, although JUDGE ROBINSON says that the application of the rule of implied condition in the subscription might not extend to a building association the same as it would to other corporations, yet he expressly fails and refuses to place his decision of the case in hand on any such distinction, but proceeds to place it on the ground of waiver or estoppel, thus finally clearly applying the rule to the case in hand, notwithstanding it was a building association. For if he had not applied the rule of condition in the subscription to the case in hand, it would have been wholly unnecessary and improper to go ahead and decide that the condition in that case had been waived. There would have been no necessity to resort to the question of estoppel if the rule did not apply to a building association.

JUDGE ROBINSON cites no authority for any such distinction, and after a diligent search we have been unable to find any case making any such distinction. In none of the cases is the reason of the rule based upon the *kind* of corporation, provided it is a stock corporation calling for the expenditure of money to a certain amount under its charter.. The reason of the rule is to comply with the mandate of justice, and to give effect to the obvious intention of parties. It is based upon the idea that a man might be willing to embark his money in a certain proportion along with others, provided they were putting up money in like proportions to a total amount, but should not in equity and justice be required to put up his money by the corporation until its affairs had been fully financed according to the amount stated in its charter.

so as to insure the success of the enterprise. If this is the reason of the rule, it is impossible to see on what ground a distinction can be made between corporations in the application of the rule, no matter what is the object of the enterprise, if both authorize and require the expenditure of money. If there is anything so peculiar in the financing of a building association as to abrogate the rule so far as building associations are concerned, it has never been so decided in Maryland. The Court in *Musgrave's Case* did not so decide, but placed its decision upon an entirely different ground, which decision could not have been made without a full recognition of the applicability of the rule to even a building association.

Before defendant's subscription, all that the company had done was merely preliminary to its main object and purpose. It had leased Brown's wharf, but this entailed but little financial responsibility and the expenditure of practically no capital at all. It had bought a lot at York Street, but had paid for it with mortgages on the lot, and the lot was presumably worth the mortgages. It went along in this preliminary way from July 1, 1906, to the 10th day of June, 1907, when the subscription of appellee was taken. After July 1, 1906, under its lease with the Western Maryland, it did a small business as warehouseman at Brown's wharf. The taking of the lease did not impose any financial hardship upon the company. The company was put in debt by the building. The giving of the mortgage did not embarrass the company; it was the beginning of the building, in July, 1907, that was the cause of the failure of the storage company.

When, therefore, Mr. Brady went to appellee, June 10, 1907, to get his \$30,000 subscription, there was nothing in the kind or nature of the company or in the character of its business or its business situation which in any way whatever deprived appellee of the benefit of the rule, that his subscription was based upon the implied condition that he was not to be liable at all, unless all the capital stock was subscribed. On the contrary, every condition and reason was present in the situation to entitle him to the benefit of this

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rule. The company had merely perfected a preliminary organization, but not a full organization. It had for some months been doing a small business preliminary to the main business it intended to do, but had not commenced the main business. It now desired its capital stock subscribed in large amounts to fully organize the company and proceed with its main business. It was about to involve its stockholders in large financial obligations. It was the same as though the company was about to newly organize for its main and most expensive purposes. If, therefore, there ever was a time or a situation which entitled a subscribing stockholder to the benefit of the rule of this implied condition it was this time and this situation.

We, therefore, submit that there is nothing in the contention that this corporation at the time it procured appellee's subscription was not the kind of corporation, or was not doing the kind of business, or was not in the sort of situation which would entitle a stockholder to the benefit of the rule; but that, on the contrary, under the circumstances of this case, every ground and reason allowed by the authorities in Maryland and elsewhere for the application of the rule to appellee's subscription, were present and entitled him to it.

But it will be contended further by appellants that this company was chartered by certificate in November, 1904, and later on effected a preliminary organization, and had a president and officers, and that appellee's subscription not being made at the time of the preliminary organization, but subsequent thereto, is not entitled to the benefit of the rule. The Maryland authorities are a full answer to this contention. In *Morrison's Case*, 48 Md., this Court, speaking of the rule of the condition of subscriptions, says: "And this well-settled rule applies to subscriptions before and after the company is chartered." See also 2 *Clark & Marshall, Corp.* sec. 382, page 1177; sec. 439, etc., page 1365.

In *Musgrave's Case*, 54 Md., the rule was applied in favor of a subscriber to stock, notwithstanding the company organized in April, 1869, and continued in the prosecution of its

business for which it was chartered from that time continuously down to May, 1871, when Musgrave became a stockholder. Notwithstanding the doubt JUDGE ROBINSON had in that case, whether the rule would apply to a building association, he seems to have had no doubt about the application of the rule to Musgrave's subscription, notwithstanding he did not become a subscriber until more than two years after the company had organized and during which it had been doing business. He expressly allowed him the benefit of the rule of the condition of the subscription, but defeated him on the ground of acts of estoppel, which amounted to a waiver of the condition. See *S. & K. R. Co. v. Cushing*, 45 Me. 524; *Munroe v. Ry. Co.*, 28 Mich. 275.

In *Temple v. Lemon*, 112 Ill. 55, the subscriptions sued on were taken after the company had formed, and after it had done business, and yet the rule was allowed. The reason of all this is well illustrated in the case of *Anvill Mining Co. v. Sherman*, 74 Wis. 228, where the rule was allowed in favor of an after-subscribing stockholder, because, as the Court there said, before the company can embark upon its *main* enterprise, incurring the *main* expense, all its stock must be subscribed.

There is nothing, therefore, in the *time* of his subscription which will deprive appellant of the benefit of the rule.

But it will be contended further that the manner in which he subscribed for this stock or the circumstances under which he subscribed, deprive his subscription of the benefit of the rule. It will be said that when he subscribed he knew that the company had organized, even though the organization was but a temporary or preliminary one; that it was doing some little business; that it had rented a warehouse from the Western Maryland Railroad Company, and in the lease had promised to build a warehouse, and that it contemplated spending a large sum of money to build a warehouse of its own, and that one who subscribes under these circumstances and with this knowledge cannot have the benefit of the rule which makes his subscription a conditional one. But why not?

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What is there in all this which places appellee in a different position from that usually occupied by every man who takes stock in an enterprise of this kind? Whoever subscribed for stock in any concern without the knowledge that the company was about to embark in some business which would require the expenditure of money? The very fact that he was asked to subscribe for stock would inform him that the company needed money to invest in some enterprise. Every man who subscribes for stock, whether at the time of the first organization or later, if he is a business man at all, endeavors to thoroughly inform himself before he subscribes as to the object of the company, what business it proposes to embark in, what money it proposes to spend, what it has in the way of property, what it is doing in the way of business and what it proposes to do. It is common knowledge that no business man subscribes to stock without knowing all these things, or at least trying to know them as far as he can. When was it ever heard before that this knowledge on the part of the intending subscriber would deprive him of the benefit of the rule or the condition of his subscription?

As we have said above, the very fact that appellee knew the company contemplated a new departure and was about to build an expensive building and change from the condition of a concern doing a little business, which required little or no capital, and involved it in but little liability, entitled the appellee peculiarly to the benefit of the rule. A subscriber may know that a coal company has leased coal lands, or has bought coal lands, and wants to pay for them and wants to spend large money in improving the same, and yet it would be idle to say that this very knowledge on his part, that the company was about to spend large moneys in the enterprise, would deprive him of the benefit of the rule, that he was not to be bound unless the whole capital stock is subscribed. On the contrary, it is just in such a case as that that the rule applies with peculiar force. That is the very time and the very occasion when a man will not embark his money without some guarantee in the law that others to the full amount of

the capital stock will share the burden with him, and that the company will not and cannot, merely because he has subscribed a certain amount, throw the whole burden of the enterprise upon him. It is too clear for argument, therefore, that there is nothing in the manner of appellee's subscription, or in the circumstances under which he subscribed, which will deprive him of the benefit of the rule which inheres as a matter of law in his contract of subscription.

The implied right to the condition of the subscription is a valuable right, which belonged to the appellee the moment he signed for the stock. It was a right which arose out of the contract of subscription and because of the contract. It did not exist before the subscription. It could, therefore, only be waived by some act done at the time of the subscription or thereafter. Therefore, acts done before the subscription could not waive a right which arose out of the subscription, and which did not accrue until the subscription had been signed. And so it was held in *Curry Hotel Company v. Mullin*, 93 Mich. 319, that no acts done by the stockholders before the subscription could constitute a waiver of this right which grew out of the subscription. This is sufficiently obvious, and narrows the case down to the consideration alone of those acts of the appellee which were done at the time of the subscription or thereafter.

It is said that at the time the defendant subscribed and shortly thereafter he consented to be elected a director of the storage company, and that shortly thereafter he was elected a director and notified of his election, and that thereafter he was several times requested and urged to attend a meeting of directors, but always failed or neglected to do so. Now, what is there in all this which would estop appellee in his defense or amount to a waiver of his right? Estoppels of this kind are based upon conduct inconsistent with his present claim of right. At the time he consented, what was inconsistent in his consent to be elected a director?

He had subscribed for \$30,000 of stock in the company, based upon a legal condition precedent that all the remainder

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of the capital stock should be taken before he was bound. He naturally expected the company to go ahead and complete its organization according to this condition. Relying upon this, as he had a right to rely, was there anything inconsistent with his right to permit himself to be elected a director in a company which he had every right to suppose would in its further conduct proceed according to law? Becoming a director was perfectly consistent with all this. The estoppel is based upon inconsistent conduct, but there is nothing inconsistent here. His becoming a director was perfectly consistent all the time with his right to claim the condition of his subscription.

But it is said further that Mr. Timanus testified that he told him that the storage company was proceeding with its building. At what time he told appellee this does not certainly appear, but it was some time in the summer of 1907. It is not shown, however, that on these occasions he did anything or said anything, and there is not a particle of testimony in the record tending to show that appellee during this time knew or had any reason to suppose that the storage company was going ahead or getting itself in debt without getting its stock subscribed. It is said appellee did not object to the company's going ahead with the building. But why should he object? What right did he have to object? He had a right to presume that the company had financed its stock. His failure to object, therefore, was in no way inconsistent with his right to have all the stock subscribed. He never acted as a director or attended any of the meetings, either as director or stockholder. From beginning to end he took no part in the proceedings or conduct of the company. It is not shown that he had been informed by the company that it had let a large and expensive contract and had gone heavily in debt. So far as the record discloses, the first information appellee had is the letter of Mr. Henderson, August 26, 1907, calling on appellee for an installment of stock subscription, because "funds are needed for the completion of building now under construction at Dodson's wharf."

Appellee replies to this, August 30, 1907, that when he signed his subscription it was with the understanding with Mr. Brady that he would not be called upon for any payment until financial conditions became easier. Then follows the testimony of Mr. Timanus, that in pursuance of the action of the directors, September 24, 1907, he called on appellee and told him the company was in difficulties and asked for a payment on his subscription. Here, then, on or about September 24th, was the first time appellee was informed that the company needed money for its contractors. In the meantime, from July 1st, the company had gone ahead without obtaining any further subscriptions to its stock to amount to anything, after appellee subscribed, and had let a building contract for more than \$136,000. It had not in any way complied with the condition of appellee's subscription. It had gotten itself head over heels in debt, and all this had been done without the knowledge of appellee down to September 24th, when he was called upon by Mr. Timanus for money and informed of the difficulties of the company. During all this time he had a right to presume that the company was keeping its contract with him, including the condition of his subscription. During all this time there is not one act shown on the part of appellee inconsistent with his defense to this action.

But it is said that some time in September, Mr. Brady called on appellee for a part of his subscription, and that appellee said he would try to arrange for some part of it, and that under the business conditions and money conditions, "he thought we had better hold off in the work at that time," and that in the latter part of September or early in October, Brady, Timanus and appellee, at the request of Timanus, went down to look at the building. They went all over the building and looked at it, and that appellee said he thought "we did very well, and the building was a very good one." That "we had made good progress, and it looked like a good building;" and that Mr. Timanus asked him for \$5,000 on his subscription, and that appellee said he was going to New

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York, and would try to raise some money for his payment to the storage company. And this testimony is relied upon as showing an estoppel upon the appellee.

But what was inconsistent in all this with the condition of his subscription? It was no act on his part as a member of the company, either as director or stockholder, which contributed in the slightest particular to bringing about the predicament in which the storage company then found itself. He had done no act which either directly or impliedly authorized the making of the debt, or which had encouraged the company in making the debt. Brady and Timanus say he made some indefinite promise about paying part of his subscription, but he did not pay. Even at that time the damage had been done, the debt had been created, the embarrassment existed, the company was insolvent. As soon as he heard of it he advised Brady to stop the work. In his letter to Messrs. Gibson and Smith, October 30, 1907, appellee says that at the time of his subscription he had advised Brady it was not wise to undertake any construction until conditions had improved, and criticises the policy of the company in undertaking the building without sufficient capital, and because of the hard times. Instead of doing any act encouraging the company toward incurring this disaster, this letter to Gibson and Smith, and the testimony of Mr. Brady show the attitude of appellee was one of cautious protest against incurring liability before the company was properly financed. He spoke of the building as a good one, but there is nothing in this to indicate that he thereby approved the policy of the company in bankrupting itself to build it. He merely gave expression to an obvious fact to the effect that the building had been well constructed. This was no doubt true, but cannot be construed by any stretch of the imagination into an approval of the policy which had procured the fine building at the expense of the solvency of the company, and even if he had paid a part of his subscription instead of making some indefinite promises in regard thereto, such payment *at that time* would

not have been inconsistent with his right to refuse to pay any further calls.

These, then, are the acts and all the acts relied upon by appellants to estop the appellee from setting up his defense of partial subscription. To these acts occurring after the subscription may be added all the other evidence in the record (if deemed admissible), showing the state of the knowledge of appellee of the situation and affairs of the storage company at the time he made the subscription, and all of it combined falls far short of that which will estop the appellee under the rule of waiver or estoppel in such cases laid down in this State and elsewhere.. *Garling's Case*, 41 Md. 305; *Stillman's Case*, 44 Md. 380; *Gettysburg Bank Case*, 95 Md. 367; *Central R. Co. v. Johnson*, 30 N. H. 408; *Ridgfield R. Co. v. Reynolds*, 46 Conn. 375; *Parker v. Thomas*, 19 Ind. 220; *Salem Mill Dam v. Rope*, 9 Pick. 194; *Munroe v. F. W. R. Co.*, 28 Mich. 275.

PEARCE, J., delivered the opinion of the Court.

This action was brought in the Circuit Court for Baltimore County by John H. Morgan and Frank B. Smith, receivers of the Maryland Storage Company, a corporation under the laws of Maryland, duly adjudged to be insolvent, against Fairfax S. Landstreet, to recover the sum of \$30,000, being the amount of the defendant's written subscription made June 10, 1907, for 600 shares of the capital stock of said company of the par value of \$50 per share. The proceeding was by way of attachment against the defendant as a non-resident, who entered a voluntary appearance in the summons case. The short note contained one count for money due on account stated, and a special count on the contract of subscription. The defendant filed the two general issue pleas in assumpsit, and a third plea, "that the subscription mentioned in the plaintiffs' declaration was subject to a condition precedent, that said subscription was not to be binding on the defendant until all of the original capital stock of the said Maryland Storage Company was duly subscribed, and that

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subscriptions were never obtained for all of said original stock, and said condition precedent never complied with, whereby the defendant's subscription never became effective or binding." The plaintiffs joined issue on the defendant's first and second pleas, and to the third plea filed two replications—first, that said subscription was not subject to the condition precedent pleaded; and, second, that the defendant, by his acts, had waived any and all defense on account of the alleged fact that all of the original capital stock of the Maryland Storage Company was not subscribed.

The defendant joined issue on the first replication to the third plea, and as to the second replication, rejoined that he had not, by his acts, waived any defense on account of the alleged fact that all of the said original stock had not been subscribed. And the plaintiffs joined issue by way of surrejoinder on the defendant's rejoinder to the plaintiffs' second replication to the defendant's third plea. It thus appears that the fact of the subscription was admitted, and also that no part of the same has been paid, and under the pleadings two questions only were in issue—first, whether the contract of subscription was subject to the condition precedent pleaded; and, second, if so, whether such condition had been waived by the acts of the defendant.

At the close of all the testimony on both sides of the case, the defendant moved to strike out certain items of testimony which had been admitted subject to exception, and the plaintiffs moved to strike all the testimony adduced at the trial which tends to qualify the written subscription; whether contained in the defendant's own statements or in his letters offered in evidence, or in the testimony of the witnesses Timanus and Brady; also defendant's statement of what he told Timanus as to taking the last \$30,000 of stock, when he, Timanus, had secured the balance, and also what he said either to Redwood or Brady, as to any subscription to be made to this stock by the Western Maryland Railroad Company. Both these requests were refused.

The plaintiffs then offered five prayers, all of which were

rejected, and the defendant offered three prayers, of which the second and third were rejected, and the first was granted, as follows: "The Court instructs the jury that by the uncontradicted evidence in the case the stock of the Maryland Storage Company authorized by its charter was never fully subscribed, and their verdict must be for the defendant, there being no evidence in the case legally sufficient to estop the defendant from setting up the defense of partial subscription to stock," thus withdrawing the case from the jury. The rejected prayers will be set out by the Rejoinder. The defendant excepted specially to the plaintiffs' second prayer on the ground that there was no evidence that defendant subscribed to any increased capital stock of the storage company, and not its formative or original stock, and this special exception was sustained; all of these rulings being embraced in the single exception taken.

A brief statement of the history of the case will throw material light upon the situation, before going into the law applicable to the case.

The storage company was incorporated under the laws of Maryland, Nov. 18th, 1904, to carry on a forwarding and warehouse business, there being seven directors, and the authorized stock being 3,000 shares of the par value of \$50 each. Mr. Timanus was then President of the storage company, and Mr. Landstreet was then Vice-President of the Western Md. R. R. Co. This company had recently established a tidewater terminus at Port Covington, and one of the principal objects of the organization of the storage company was to secure the storage business incidental to the new tidewater terminus. This appears in Mr. Timanus' letter of July 1st, 1904, to Mr. Landstreet as Vice-President of the railroad company. On November 17th, 1904, Timanus, learning that the railroad company was about to acquire the possession of Brown's wharf, on the north side of the harbor of Baltimore City, proposed to Landstreet to take a lease of the warehouse then on that wharf. This permitted, without further cost for building, a small active business, requiring nine or

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ten clerks and laborers and doing a business of about \$1,800 a month. He testified they were trying to get the railroad company or Landstreet interested in the storage company. No agreement was reached in the matter of the lease until June 12, 1906, when a lease of Brown's wharf was executed for five years, containing a covenant on the part of the storage company to erect a storage house on York Street, to be completed, if possible, by January 1st, 1907. At that time there was no actual subscription by Landstreet, either for the railroad company, in his own name, or for any other individual. In May, 1905, the charter was duly amended, so as to increase the number of directors from seven to nine. In July, 1906, a stockholders' meeting was called for the purpose of increasing the capital stock from \$150,000 to \$250,000 and the number of directors from nine to twelve. It appears from the minutes of that meeting that stockholders were present representing sixty-five shares of stock, that being more than two-thirds of the whole number of shares then issued, and that these voted to increase the amount of capital stock and the number of directors as above proposed. These proceedings, however, were abortive, both because the requisits notice was not properly addressed to the stockholders, and because the proposed amendment was not acknowledged and recorded as required by secs. 51, 52 and 55 of Art. 23 of the Code.

In May, 1907, Landstreet resigned as Vice-President of the railroad company, and Brady, Vice-President of the storage company, testifies that at that time he asked him when he would sign a subscription, as some who had subscribed would not pay until they felt sure of his subscription, as he had resigned from the railroad company, and he said he would let him hear in a few days. Later he told Landstreet they wanted him as a director. On June 10, 1907, he signed the subscription and consented to be elected a director. At that time there were ten directors elected and serving, being one more than the charter allowed. Landstreet never quali-

fied as director, and never attended any stockholders' or directors' meeting.

At the date of his subscription, Brady testifies there were subscriptions, including Landstreet's, of about \$101,000, and no greater amount was ever subscribed.

Mr. Morgan, one of the receivers, testified from the books and papers that came into his hands as receiver, that at that time \$40,000 had been paid in on subscriptions, about \$36,000 unconditional subscriptions, unpaid, including Landstreet's \$30,000, and some conditional subscriptions, unpaid, the whole amounting to about \$101,000, as stated by Brady.

On July 1, 1907, there being then only \$76,000 unconditionally subscribed, including the \$30,000 of Landstreet, the directors resolved to build the York Street storage house at a cost not to exceed \$145,000. The York Street lot was subject to two mortgages aggregating \$51,000, and the building contract called for an expenditure of \$136,000. The lot sold for barely enough to cover these mortgages. Brady in the latter part of July, 1907, tried to induce Landstreet to go to see the building, then started, but he declined to go. In September, 1907, he asked Landstreet for a payment on the subscription, and he told Brady that, under the business and financial conditions existing they ought to hold off the work, and Brady explained they had gone too far to stop. Later, and early in October, Landstreet did go with Timanus and Brady and examine the work in progress, and he said he thought it was a good building. Brady did not then ask for any payment and did not hear Timanus ask for any; and Brady never afterwards saw him on that subject.

Timanus testified that he asked Landstreet several times in the summer and fall of 1907 for payments on account, and his answer was that money was hard to get, and once, in September, 1907, he said he was not liable and would not pay it at all.

He also testified that Landstreet told him that when he subscribed Brady told him that all the stock had been either subscribed or promised. Brady, however, denied this, and

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said that he told Landstreet that his binding subscription would enable them to get many others, but did not say they could complete the total authorized capital. Landstreet testified that when the organization of the storage company was under discussion between Timanus and himself, he said that if he would get a strong management and have the finances in unquestionable form before undertaking the enterprise, the railroad company would co-operate with him and would take the last \$30,000 of its stock of \$150,000, and that in all the negotiations throughout he acted in behalf of the railroad company, and at no time and in no way as an individual, and that it was so understood by all concerned. He states that as early as January, 1907, when informed by Brady of their plan to acquire property on the south side of the harbor that he advised against any additional enterprises, and that after his resignation as Vice-President of the railroad company he remained one of its directors, and told both Timanus and Brady they would have to take up the subscription of the railroad company with other officials and that if the storage company complied with the previous understanding, he saw no reason why the matter should not be concluded. That shortly after this Brady came to see him, and said that he had responsible men in Baltimore, mentioning a number of them, who were only waiting for the signature of the railroad company, and who would then sign subscriptions to the full amount of the authorized capital stock of the company, and urged him to sign personally for this \$30,000, which he did upon those assurances, and the further assurance that their finances were in condition to meet any undertaking entered into.

He also says, that in signing he expressly stated to Brady that he was not signing his name as an individual that would engage him in any financial obligation, and that Brady replied nothing was to be paid on that subscription until business conditions would warrant it. He also says that when he visited the building in October, 1907, no reference was made to his subscription, but Messrs. Timanus and

Brady stated that they wished to arrange with the Western Md. R. R. Co. to take over this building, and some of the officials advised them to get him to examine it, so that he could report thereon to the executive board.

We have thus condensed the most material testimony in the case, and will now consider the propriety of the granted instruction, which constitutes the principal and controlling question in this appeal.

We could not expect, and do not understand the appellants to deny the general rule, that where the capital stock and the number of shares are fixed by the act, or certificate, of incorporation as in the present case, no assessment can be lawfully made on the share of any subscriber until the whole number of shares has been taken. This principle was early adopted both in England and in this country, and is now firmly established as a rule of law. Two of the earliest cases in this country are *Salem Mill Dam v. Ropes*, 6 Pick. 23, and *Stoneham v. Gould*, 2 Gray, 277, in both of which the reasons for the rule were given by eminent Chief Judges of the Supreme Court of Massachusetts, PARKER and SHAW. No more convincing reasons could be given than those stated by CHIEF JUDGE SHAW in 2 *Gray*, *supra*. He says: "This is no arbitrary rule. It is founded on the plain dictate of justice and the strict principles regulating the obligation of contract. When a man subscribes for a share of stock, consisting of one thousand shares, in order to carry on some designated enterprise, he binds himself to pay one-thousandth part of the cost of such enterprise. If only five hundred are subscribed for, and he can have no assurance which he is bound to accept, that the remainder will be taken, he would be held, if liable to an assessment, to pay one-five hundredth part of the enterprise, besides incurring the risk of the entire failure of the enterprise itself, and the loss of the amount advanced towards it."

This rule, with the reasons which led to it, were adopted in this State in *Hughes v. Antietam*, 34 Md. 331, and has been laid down consistently since in *Cleveland v. Hager*, 36

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Md. 476; *Gurling v. Baechtel*, 41 Md. 305; *Dougherty v. Gilman*, 44 Md. 380; *Morrison v. Dorsey*, 48 Md. 472; *Musgrave v. Morrison*, 54 Md. 164, and *Gettysburg Bank v. Brown*, 95 Md. 367. In the last-mentioned, the latest case upon the point in this State, JUDGE PAGE said: "These rules apply to subscriptions made before and *after* the company is chartered. They are founded upon the theory that the subscription is made upon the implied understanding that the entire amount of stock fixed by the charter is necessary for the successful prosecution of the business for which the company was incorporated. It is not to be supposed that a reasonably prudent person will invest in a corporation which is not to be supplied with sufficient capital with which to prosecute its affairs; and therefore it is that a presumption arises that the amount fixed in the charter shall be raised before the corporation creates any liabilities."

There are substantial differences, it is true, in this regard between "original or formative" stock and "increased" stock, but that question does not arise here, because the attempt to increase the stock was not operative.

It is sufficient that the Maryland rule is as stated, but, as indicating its soundness and universality, it may be stated that it prevails in New York, Missouri, Connecticut, New Hampshire, Wisconsin, Iowa, Georgia, California, Illinois, Maine, Tennessee, Ohio and generally throughout the United States.

It will be observed that it is spoken of generally as an implied rule, but it may of course be expressed, and in this case the uncontradicted testimony of Mr. Landstreet is that he expressly agreed to take only *the last \$30,000 of the whole amount of \$150,000*, so that his subscription was upon the express condition that the whole residue of the stock should be taken before his subscription became binding. This condition not having been incorporated in the written subscription, might, perhaps, not have been available as a defense, if the residue had been fully and unconditionally subscribed; but the uncontradicted evidence in this case shows that there

were never over \$76,000 unconditional subscriptions, and the cases are uniform that for this purpose there can be counted only unconditional subscriptions, payable in cash. *Troy v. R. R. Co.*, 8 Gray, 596; *Oscaloosa v. Parkhurst*, 54 Iowa, 357; *Brand v. Lawrenceville R. R.*, 77 Geo. 506; *Cal. Southern Hotel Co. v. Russell*, 83 Cal. 277.

While the appellants, as we have said, do not deny the general rule invoked, they do contend that "if the corporation is already a going concern at the time of the subscription, and is continuing to create liabilities to the knowledge of the subscriber, and the subscriber also knows that its stock fixed in its charter is not fully subscribed," then the presumption which this Court, in *Gettysburg Bank v. Brown*, 95 Md. 386, said arises, "that the amount fixed in the charter shall be raised before the corporation creates liabilities," cannot arise, and the rule has no application. This contention seems to us to confound the general rule with the subsidiary rule, equally well settled, that this defense may be waived, or the subscriber be estopped from setting it up. The appellants cite in support of their contention what they concede to be a dictum of this Court in *Musgrove v. Morrison*, 54 Md. 161, in which JUDGE ROBINSON said: "We do not mean to say that this rule applies to corporations of every kind without regard to the objects and purposes for which they are chartered. * * *. In this case, the company was chartered for the purpose of buying, selling and leasing property and also as a homestead and building association, and at the time of the appellant's subscription was engaged in the prosecution of its business, and he knew at the same time that its whole capital stock had not been taken, and under these circumstances it might well be argued that his subscription was not made upon the condition that the company was not to organize until the whole number of shares had been taken." But the learned Judge, nevertheless, placed the decision squarely on the ground that during three years that he was a member, he not only regularly paid his weekly dues, but accepted his proportion of the profits earned, and through an attorney

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voted his stock at all meetings, whether for the election of directors or the transaction of other business, and the Court expressly states that all this time he knew the whole capital stock had not been taken.

Another case cited for their contention is *Arkadelphia Mills v. Trimble*, 54 Ark. 519, in which the Court said: "The fact was that the corporation began business as soon as the \$14,500 was subscribed, and after that Trimble agreed to take and pay for the \$500 subscribed by him. From this it is evident that there was and could be no implied condition in his agreement that the corporation should not begin business until all the capital stock was taken. The corporation was engaged in business when he subscribed. It was evident it would need money in the prosecution of its enterprise, for if it would not, there was no necessity for his subscription. He was not to be an honorary member." A little further examination of that case will show, however, that far from supporting the appellants' contention as applied to the facts of this case, it bears out the application of the general rule as inherent in the appellee's subscription, and shows it as avoidable only by waiver or estoppel. The articles of association in that case which were subscribed by Trimble contained the following provision: "The amount of capital stock of said association shall be \$50,000, of which \$14,500 have been subscribed by corporators aforesaid, and the residue may be issued and disposed of as the board of directors may from time to time order and direct;" and the Court said: "No implication arises from this provision that the corporation was to postpone its enterprise until all the capital stock had been subscribed. The most reasonable inference to be drawn from it is that the \$14,500 was all the money needed for the purpose. The fact was that it began business as soon as the \$14,500 was subscribed, and after that Trimble agreed to take his stock." These articles of association could well be construed as fixing the formative or original stock at \$14,500, with power to increase the same from time to time as the directors should see fit, up to \$50,000, and this is precisely

what it is fair to presume JUDGE ROBINSON meant in *Musgrave v. Morrison, supra*, when he said, on page 164: "It may be obvious from the face of the charter itself, that the whole capital stock is not in any manner necessary to the organization of the company, and that the subscriber knew, or had reason to know, this at the time of subscription."

We can perceive nothing in the case before us in the nature or kind of business for which the storage company was incorporated (if that can in any case be a proper subject of inquiry), nor in the time when, or the circumstances under which, the appellee made the subscription in suit which should take this case out of the general rule. It appears from the subscription blank that the capital stock was then designed to be \$250,000, presumably upon the supposition that the attempted increase from \$150,000, as fixed by the certificate, to \$250,000 was regular and effective. The original stock, however, was \$150,000, and there is no evidence, as in the *Arkansas case, supra*, that the charter authorized the organization of its main enterprise before the full amount was subscribed. The subscription in this case was made June 10, 1907. Prior to June 12th, 1906, the company was doing a small business, principally in towing and lighterage, requiring comparatively small capital. In July, 1906, it leased Brown's wharf and began a storage business there, but at that time it contemplated the expenditure of a large amount in the erection of a modern storage warehouse, to which it bound itself in that lease in pursuance of negotiations with the appellee representing the railroad company. The erection of that warehouse, for that purpose, then became and continued to be its main enterprise. The appellee's subscription was made June 10, 1907, and the building contract, made in July, 1907, called for an expenditure of \$136,000, nearly the whole of the authorized capital. In addition to this, the storage company purchased ground on which to erect the warehouse, and mortgaged the same for \$50,000. All this was done without the concurrence of the appellee, who at the time of making the subscription advised against undertaking any construction un-

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der existing business conditions, and continued so to advise. In considering this situation it must not be forgotten, as said in *Hager v. Cleveland*, 36 Md. 487, that "there is a wide difference between the *existence* of the company as a corporate body, and the liability of parties for their subscriptions to its capital stock;" and, as repeated in *Gettysburg Bank v. Brown*, 95 Md. 385, that "this rule applies to subscriptions made before and *after* the company is chartered." The fact that the appellee knew that the storage company was about to involve its stockholders in this large financial undertaking is conclusive that he was entitled to the benefit of the rule he now invokes. We cannot imagine a situation in which this rule could apply with more peculiar force if the reasons so forcibly assigned by JUDGE SHAW in 2 *Gray*, *supra*, and so fully approved by this and other Courts, are in themselves sound and satisfactory.

But it remains to enquire whether this defense has been waived, or the appellee estopped to claim its benefit.

In considering this question it must be kept in mind that there is not only no evidence to show that Landstreet did not know all the stock was not subscribed, but that he subscribed in reliance upon Brady's assurance that it was all either actually subscribed or promised to be subscribed immediately upon his subscription being made, as indicating the co-operation of the railroad company. Technical estoppel, it may be conceded, is not required, and any acts which constitute waiver will be sufficient.

It is uncontradicted that Landstreet never qualified as a director, and never attended any directors' or stockholders' meeting, nor participated in any way in the incurring of any obligation or the transaction of any business of the company.

In *Garling v. Baechtel*, 41 Md. 305, it was held that where a stockholder attends meetings of the company, *knowing the whole capital stock has not been taken*, and votes for the expenditure of money for the purchase of property and materials to carry on the business of the company, he will not be

permitted to set up the defense that the capital stock had not all been taken. And to the same effect is *Hager v. Cleveland*, 36 Md. 476; *Stillman v. Dougherty*, 44 Md. 380. But in *Garling v. Baechtel*, 41 Md., *supra*, which was a suit to recover of Garling as a stockholder a debt due Baechtel by the company, JUDGE ROBINSON also said: "The mere fact that he paid his subscription, knowing that the whole capital stock had not been paid in, and that the company was incurring debts for property and material, were not such acts of participation as to estop him from setting up in this action the partial subscription of the capital stock." And this was held also in *Bray v. Farwell*, 81 N. Y. 600, in a similar case, where defendant never attended a stockholders' meeting or assented in any way to the commencement of the enterprise before all the shares were taken.

In *Ridgefield R. R. v. Reynolds*, 46 Conn. 375, Reynolds attended stockholders' meeting to elect directors and was himself elected a director and accepted. He was present at a meeting of directors when an assessment of forty per cent. was laid, and when a report was made by the President of a contract for construction, and work actually begun; but it did not appear he participated in any *action taken* at the meeting. It was held none of these things constituted a waiver. CHIEF JUSTICE PARK said: "The case is silent as to his *conduct*. His simple *presence* is as much in accord with one supposition as the other. The burden of proof is on the appellees."

In *Masonic Temple v. Channell*, 43 Minn. 353, the Court said: "It is to be regretted that there has been any relaxation of this rule. The acts as stockholder which will constitute a waiver are those which constitute a part of the business for which the corporation is formed, and which evince a willingness to enter upon that business with the stock already subscribed." This is a clear and plain statement of the principle upon which all such questions should be resolved.

In that case the defendant was a director, attended meetings as such, and was chairman of a committee to select a

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building site, and only resisted payment when the site he favored was not selected. This was held a waiver. The facts in this case do not, in our opinion, bring it within any well-considered decision under which a waiver could be found, and we think the learned Judge below correctly granted the defendant's first prayer.

As this necessarily requires the affirmance of the judgment, there is no occasion to consider the other prayers, nor the disposition of the motions to strike out evidence, all of which were refused.

Judgment affirmed with costs to the appellee above and below.

ANNAPOLIS GAS AND ELECTRIC LIGHT COMPANY *vs.* OSCAR FREDERICKS.

Injury from Electric Wire Strung on Bridge—Evidence—Instructions to the Jury—Walking on Driveway—Medical Expert.

When it is alleged that a person was injured by the defective condition of an electric light wire at a certain time and place, evidence is not admissible to show the condition of the wire at that place on the following day.

Defendant's electric wire was strung along the side of a public bridge and over the water, at a distance of nine feet five inches from the floor of the bridge. Plaintiff's evidence was that while he was standing on that side of the bridge by the rail, the footway being on the other side, his hat was blown off and in reaching for it he touched the live electric wire. In an action against the electric company, *held*, that a prayer offered by the plaintiff is erroneous which does not require

the jury to find whether the wire was sagging at the time and place of the accident, so as to be dangerous to persons using the bridge with due care, and that the defendant knew, or, by the exercise of ordinary diligence, could have known, that the wire was so sagging, and that the wire was originally constructed in a proper manner at the place.

Held, further, that the plaintiff was not guilty of contributory negligence as matter of law.

In an action to recover damages for an injury caused by an electric wire, a prayer which states in abstract terms the duty of persons using dangerous agencies on a highway, without making any reference to the particular facts in evidence, is held in this case to be general and misleading.

A pedestrian who uses the driveway of a bridge instead of the footway is not a trespasser.

A graduate of a reputable medical school who has practiced medicine for five years is qualified to testify as a medical expert.

Decided January 27th, 1909.

Appeal from the Circuit Court for Anne Arundel County (FORSYTHE, J.), where there was a judgment on verdict for the plaintiff for \$500.

Defendant's 1½ Prayer.—That there is no evidence in this case legally sufficient to entitle the plaintiff to recover and the verdict must be for the defendant. (*Refused.*)

Defendant's 1st Prayer.—If the jury find that the plaintiff was damaged as alleged in the declaration and that said damage was caused by want of ordinary care on the part of the plaintiff, then he is not entitled to recover, although the jury may find that the wires of the defendant company at the time of said damage were out of repair. (*Rejected.*)

Defendant's 2nd Prayer.—The jury is instructed that the uncontradicted facts in the case show that the plaintiff directly contributed to his own injury and the verdict must be for the defendant. (*Rejected.*)

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Defendant's 3rd Prayer.—If the jury shall believe from the evidence that the plaintiff, by the exercise of due caution and care, could have avoided the accident complained of, by such exercise of ordinary care and caution, and if they shall find that the plaintiff was guilty of contributory negligence in not exercising due care and caution, then their verdict must be for the defendant. (*Granted.*)

Defendant's 4th Prayer.—That in order to enable the plaintiff to recover in this action, the conduct of the defendant or its agents must be shown to be grossly careless and that the exercise of the proper and reasonable caution and prudence on the part of the plaintiff would not have prevented him from injury, and that the burden of proving such negligence is on the plaintiff. (*Granted.*)

Defendant's 4½ Prayer.—That if the jury shall find from the evidence that the accident in question could have been avoided by the exercise of ordinary care and caution on the part of the plaintiff, he is not entitled to recover. (*Rejected.*)

Defendant's 5th Prayer.—That if the jury find from the evidence that the injury complained of would not have occurred if the plaintiff, in crossing the said bridge, had not gone on the driveway, but that he could have crossed said bridge in safety by taking the way provided for pedestrians, that the accident would not have occurred, and if they shall so find, they shall find that he was a trespasser upon the driveway, and that then he is not entitled to recover in this case. (*Rejected.*)

Defendant's 6th Prayer.—If the jury find that the plaintiff was trespassing on the right of way not intended for pedestrians, their verdict shall be for the defendant. (*Rejected.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, THOMAS and HENRY, JJ.

James W. Owens and Joseph C. France, for the appellant.

James M. Munroe (with whom was *Robert Moss* on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

The appellee brought suit against the appellant company in the Circuit Court for Anne Arundel County to recover damages for an injury sustained, alleged to have been caused by contact with an electric wire charged with electricity, maintained and operated upon a public bridge connecting the City of Annapolis and the village of Eastport.

The declaration charges that the bridge is a public highway and the wires are hung and suspended over and upon poles controlled by the defendant upon the streets of the city and village and upon the bridge for the purpose of doing a general electric light business in the City of Annapolis and the village of Eastport. That the wires were permitted to become and be without proper insulation, and by reason thereof contact with the wires was dangerous to life, and the defendant while lawfully using and passing over the bridge without any negligence on his part came in contact with the wires and was injured.

The record contains four bills of exceptions. Three relate to the admissibility of evidence and the fourth as to the rulings of the Court on the prayers. The verdict and judgment were in favor of the plaintiff and the defendant has appealed.

The first exception was taken to the ruling of the Court in allowing the plaintiff to testify as to the condition of the wires subsequent to the injury. The plaintiff was asked the following question:

"Did you make any examination of the wires at the place where you were injured after the injury; if so, how soon after?"

"A. I went there early the next morning to see the condition of the wires at the place where I was shocked and burned.

"Q. What did you find to be the condition of the wires?"

"A. I examined the wires early next morning at the place

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where I was burned and found the wires in very bad condition and uninsulated and also sagging down from a foot to eighteen inches."

The general rule is well settled that evidence of the subsequent condition of the place where the accident occurs is not admissible to show a negligent condition at the time of the injury, because the question of negligence is to be determined by the actual condition at the time of the injury. There are certain well-recognized qualifications and exceptions to this rule, but as the facts of this case do not bring it within any of those exceptions, they need not be discussed here.

There was no evidence upon the part of the plaintiff or the other witnesses to the effect that the insulation of the wires was defective or that they sagged down from a foot to eighteen inches at the time of the alleged injury at the point or place where the accident is alleged to have happened. In the case of *Electric Light Co. v. Lusby*, 100 Md. 650, it was said it was error to admit this character of testimony, because the effect of the testimony as introduced was to show that the insulation of certain of the defendants' wires was defective at other points and on other occasions than at the point of contact where the accident happened. The testimony therefore was too remote and misleading and presented an issue of negligence not involved in the case. *Ziehm v. United Electric Co.*, 104 Md. 52.

In this case, the wire was not on or over the highway, but was strung along the south side of the bridge over the water and at a distance of nine feet and five inches from the floor of the bridge. The evidence tended to show that the wire as originally constructed was properly placed and located as to the safety of the public, because it was beyond the reach of those properly using the bridge. The plaintiff testified that on the night of August 8th, 1907, he went down on the bridge to get the air. While there he was attracted by the sound of a graphophone and went to the south side of the bridge, and while standing on the floor of the bridge, leaning on the rail, between the second and third truss of the bridge from the

Eastport side, "a puff of wind blew my hat off, and I grabbed for it and grabbed a live electric wire."

It was clearly incumbent upon the plaintiff to show, by competent evidence, that the wire sagged or slacked at the time of the accident and at the point where he was injured—that is, between the trusses where he was standing on the bridge—otherwise there could be no recovery in the case. The condition of the wire on the day after the accident, under the facts of this case, was not legally sufficient proof of its location and condition at the time and at the point or place of the injury. There was error in the ruling upon this exception.

The second and third exceptions are practically the same, and relate to the admission of the testimony of Dr. L. B. Henkel, who testified as a medical expert. There was no error in the rulings set out in these exceptions, and we do not understand they are seriously pressed by the appellant. Dr. Henkel testified that he was a graduate of the Maryland University School of Medicine and had practiced medicine for five years. A sufficient foundation was laid for the introduction of his testimony and the objections raised on those exceptions were properly overruled.

The fourth exception embraces the rulings of the Court upon the prayers.

The plaintiff's first and second prayers were clearly erroneous and should have been rejected.

The vice of the first prayer consisted in the omission to leave to the jury to find whether the wire was sagging at the time of the injury at or near the place where the accident occurred, so as to be dangerous to persons, using due care, while lawfully using the bridge, and that the defendant had knowledge or could have, by the exercise of ordinary diligence, ascertained that the wire was so sagging as to be dangerous, provided they found the wire was originally constructed in a proper manner at the place of the accident.

The second prayer asserted an abstract proposition of law, and was as follows: That the degree of care required by the

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law of individuals or corporations using dangerous agencies in the prosecution of their business on the public highways is proportionate to the danger involved in the use of such agency, and that the greater the danger involved to persons lawfully using said highways with due care, the greater the degree of care required in the use of such dangerous agencies, to prevent injury to persons so lawfully using the highway. This prayer was manifestly too general and misleading under the facts of this case, and should have been rejected. *McDonald v. Moore*, 68 Md. 336; *Md. Central B. Co. v. Neubeur*, 62 Md. 402.

We find no error in the ruling of the Court upon the prayers submitted on the part of the defendant. They will be set out in the report of the case, and need not be fully discussed here. The defendant's third and fourth prayers were granted, so the exception on this branch of the case relates to the rejection of the defendant's prayers number one-half, one, two, four and one-half, five and six.

The prayer marked one-half was a demurrer to the evidence and was properly rejected. The first, second and four and half prayers submitted the question of contributory negligence on the part of the plaintiff, and was covered by the defendant's third and fourth prayers, which were granted. The fifth and sixth prayers asserted a proposition of law as to trespassing upon the driveway of the bridge not applicable to the facts of the case, and were properly rejected.

The facts disclosed by the record in this case clearly distinguish it in principle from the case of *W. U. Tel. Co. v. State, use of Nelson*, 82 Md. 311, relied on by the appellee. In *Nelson's Case* the telephone wire had been hanging over the feed wire for at least two weeks, and the Court very properly said under the facts of the case: "The privileges so granted, thus to encumber the public highway with appliances so likely to become dangerous to the public safety unless properly employed and controlled, imposed upon them, and each of them, the duty of so managing their affairs as not to injure persons lawfully on the streets. They owed to Nelson

that his lawful use of the street should be substantially as safe as it was before the telegraph and railway plants had so occupied it. It was their plain duty not only to properly erect their plants, but to maintain them in such condition as not to endanger the public."

In the case at bar the wires were strung along the south side of the bridge, and not on or over the highway. As originally strung, they appear to have been properly located as to the safety of the public properly using the bridge. They were also strung where the accident happened on the driveway of the bridge, and not on the walk-side prepared for pedestrians.

It follows, the judgment will be reversed because of the errors indicated and a new trial will be awarded.

Judgment reversed and a new trial awarded, with costs.

ANTONIO LANASA vs. STATE OF MARYLAND.

Conspiracy—Sufficiency of Indictment—Repugnancy Between Verdicts on Different Counts—Constitutional Law—Cruel Punishment—Election Between Counts—Bill of Particulars—Uncorroborated Evidence of Co-Conspirators—Evidence to Discredit or Corroborate Witness—Privileged Communications.

A combination between two or more persons to accomplish by unlawful means an object not in itself criminal, or to accomplish an unlawful object, is an indictable conspiracy, although no act is done in furtherance of the object.

The offense of conspiracy is complete in such cases by the unlawful agreement and combination of the parties.

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An indictment charging that the defendant conspired with others wilfully and maliciously to injure and destroy the property of a named person is valid, and it is not necessary that the indictment should describe the particular property which was the object of the conspiracy.

The crime of conspiring to destroy a man's property is completed by the combination, although the conspirators have not determined what particular property should be destroyed.

The seventh and eighth counts of an indictment charged the defendant with a conspiracy wilfully and maliciously to injure and destroy the property and dwelling house of one Di G. The third count charged a conspiracy to injure and destroy the property of Di G. The defendant was acquitted on the seventh and eighth counts and found guilty on the third. *Held*, that there is no repugnancy between these verdicts.

When the count in the indictment under which the defendant was convicted was sufficient in law, his sentence thereunder is not in violation of the constitutional provision, that in criminal prosecutions the accused shall have the right to be informed of the nature of the accusation against him and shall not be deprived of life or liberty without due process of law.

Threatening letters demanding money had been sent to one Di G. by members of a gang called the Black Hand. He refused to comply with the demand, and a dynamite bomb was exploded in the rear of his dwelling house, causing much damage. The defendant was found guilty of a conspiracy to injure and destroy Di G.'s property, and a sentence of ten years' imprisonment was imposed. *Held*, that this sentence is not a cruel or unusual punishment within the constitutional inhibition.

A motion by a traverser in a criminal case to require the State to elect between certain counts in the indictment is addressed to the discretion of the trial Court, and no appeal lies from its action thereon, unless there be some abuse of the discretion resulting in injury to the traverser.

Under an indictment for conspiracy, a motion by the traverser to require the State to file a bill of particulars is addressed to the discretion of the trial Court.

The crime of conspiracy may not be established upon the un-

corroborated evidence of accomplices and co-conspirators, connecting the accused with the crime.

Evidence is admissible to discredit a witness by showing that he had made statements as to material facts in conflict with his testimony at the trial.

When the testimony of a witness as to certain facts has been contradicted, he cannot be corroborated by evidence in rebuttal showing that thirty-nine days after the happening of the event testified to, he made statements, not under oath, similar to his testimony.

Statements made to a lawyer are not privileged communications and as such inadmissible in evidence, unless made while the relation of attorney and client existed between the parties, or unless made during negotiations looking to the establishing of such relation and which concerned professional advice.

When three persons were indicted for conspiracy, statements made by one of them to counsel for another, who was not the legal adviser of the person making the statement, are not privileged communications, although, after they were made, there was some talk of his becoming also counsel for the one making the statement, but no such relation was ever established between them.

Decided January 15th, 1909.

Appeal from the Criminal Court of Baltimore (WRIGHT and STOCKBRIDGE, JJ.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

Thomas G. Hayes and *William L. Marbury* (with whom were *Geo. Dobbin Penniman* and *W. Purnell Hall* on the brief), for the appellant.

Isaac Lobe Straus, Attorney-General, and *Eugene O'Dunne*, Deputy State's Attorney (with whom was *Albert S. J. Owens*, State's Attorney, on the brief), for the appellee.

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BURKE, J., delivered the opinion of the Court.

1. Antonio Lanasa, together with certain named persons, was indicted in the Criminal Court of Baltimore for the crime of conspiracy. That Court, upon his motion, granted a severance as to him, and after a lengthy trial he was convicted upon the third count of the indictment, and was sentenced to be confined in the Baltimore City Jail for the term of ten years. From that judgment he has brought this appeal.

The indictment contains ten counts. The appellant filed a general demurrer to the indictment and also demurred to each count. The second, fourth and ninth counts were quashed by the Court upon motion of the State's Attorney. The demurrer to the indictment and to each count thereof was overruled. The traverser then moved the Court to require the State to elect as to the third, seventh and eighth counts, which motion the Court overruled. He was found guilty upon the third count, but was acquitted upon the six remaining counts. Motions for a new trial and in arrest of judgment were filed. He abandoned the motion for a new trial, and the motion in arrest of judgment was overruled by the Supreme Bench of Baltimore City.

The object of the conspiracy charged in the counts of the indictment upon which he was tried was as follows:

1. Feloniously, wilfully and of their malice aforethought to kill and murder Joseph Di Giorgio.

3. To wilfully and maliciously injure and destroy the property of Joseph Di Giorgio.

5. Feloniously, wilfully and of their malice aforethought to kill and murder certain members of the family and household of the said Joseph Di Giorgio.

6. Unlawfully to wound, hurt and injure certain members of the family and household of the said Joseph Di Giorgio.

7. Unlawfully to wilfully and maliciously injure and destroy the property and dwelling house of the said Joseph Di Giorgio.

8. Unlawfully to wilfully and maliciously injure and de-

stroy the property and dwelling house then and there being of the said Joseph Di Giorgio.

10. Unlawfully to extort and obtain unto themselves from the said Joseph Di Giorgio certain money and property of the said Joseph Di Giorgio.

The fifth and sixth counts set out the names of the persons who were intended to be injured, and the eighth and tenth counts set out certain overt acts done in pursuance of the conspiracy.

It is important to note that Joseph Tamburo and Salvatore Lupo are named as co-conspirators with Lanasa in each count of the indictment, and that upon the evidence of these two men the State relied to connect the appellant with the crime of which he was convicted. These two facts become of great importance when we come to consider the exceptions taken to the rulings of the Court upon the evidence. Phillipi Rei, who is frequently referred to in the record, was an Italian, who, it is alleged, was induced by Lanasa to become one of the co-conspirators. Rei was killed in Pittsburg by a fellow-countryman named Cinceria a day or two before the explosion at Di Giorgio's home. On March 30th, 1908, Lupo pleaded guilty to the eighth count, and after the conviction of Lanasa was sentenced to jail for fifteen months, and two days after Lanasa's conviction the State entered a plea of not guilty as to Tamburo.

It was contended with great earnestness and ability by the distinguished counsel for the appellant that the demurrer to the third count should have been sustained—first, because it charges no crime; secondly, because it does not sufficiently describe the object of the conspiracy. In support of the motion in arrest of judgment, in addition to the reasons assigned for grounds of the demurrer, it was urged, first, that there is an absolute and necessary repugnancy between the verdicts rendered by the jury, in that it is shown by the record that by the verdict of not guilty upon the seventh count of the indictment the traverser was acquitted of the identical crime for which he was convicted upon the third count; secondly,

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because the judgment deprives the appellant of his liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and constitutes a cruel and unusual punishment in violation of the Constitution of the United States and of the Maryland Declaration of Rights. In the elaborate briefs filed by the counsel for the appellant and the State these questions have been fully discussed, and many cases both in this country and in England upon the law of conspiracy have been called to our attention. It is apparent that upon this subject, as upon most others, there is much real or apparent conflict to be found in the adjudged cases.

Upon the settled law of this State and upon the authority of well-reasoned cases in other jurisdictions, we cannot agree that the count assailed is in any respect defective, or that the judgment should be arrested. A conspiracy may be described in general terms, as a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose; or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. It is not essential that the act intended to be done should be punishable by indictment. The *essence* of the offense consists in the *unlawful agreement and combination* of the parties; and, therefore, it is completed whenever such combination is formed, although no act be done towards carrying the main design into effect. 3 *Greenleaf on Evidence*, 2nd Ed., Secs. 89-91. It may be said that this statement of the law by Mr. Greenleaf announces the almost universally accepted doctrine upon the subject of criminal conspiracy. This is made perfectly apparent by the numerous citations from text books and reports contained in the briefs filed in this case. It is the rule which has obtained in this State since the great case of the *State v. Buchanan*, 5 H. & J. 317, in which will be found a collection of many cases in which an unexecuted conspiracy to commit acts not in themselves indictable offenses was held to be a criminal conspiracy. In the course of his opinion in that case, JUDGE BUCHANAN said: "In 1 *Hawk. P. C.* 190,

ch. 72, it is said: 'There can be no doubt, that all combinations whatsoever, wrongfully to prejudice a third person, are highly criminal at common law.' This is literally adopted and transcribed into 1 *Burn's Justice*, 378, and 3 *Wilson's Works*, 118. *Chitty*, in his 3rd Vol. *on Criminal Law*, 1139, says: 'In a word, all confederacies wrongfully to prejudice another are misdemeanors at common law, whether the intention is to injure his property, his person, or his character.' And in 4 *Blackstone Com.* 137 (Christian's Note 4): 'Every confederacy to injure individuals, or to do acts which are unlawful or prejudicial to the community, is a conspiracy.' "

We cannot for a moment doubt that a combination and agreement between two or more persons wilfully and maliciously to injure and destroy the property of a third person is a completed criminal conspiracy, and is the subject of an indictment. Nor is it necessary to the completion of the crime that the conspirators should determine in advance what particular property should be injured or destroyed. To hold that the law cannot interpose and arrest by criminal procedure the malicious purposes of the conspirators, unless they had agreed upon the destruction of some particular property would strip it of its most beneficent preventive powers and leave the confederates at liberty to consummate their wicked purposes. The law is not so impotent and ineffective. As it is not essential to the completion of the offense that any particular property should be destroyed, it is, therefore, not required that the object of the unexecuted conspiracy should be set out with great particularity and certainty in the indictment, because only such facts need be stated as shall fairly and reasonably inform the accused of the offense with which he is charged. To require more in such a case would be to put an unnecessary burden upon the State, and make it impossible in many cases to secure the conviction of the guilty. The position taken by the State, that in a prosecution for such an offense as that charged in the third count, the indictment need not particularly describe the *property*, the injury or destruction of which was the object of the conspiracy, is well supported

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by the authorities. 2 *Bishop, New Criminal Procedure*, secs. 204, 7, 8; 2 *Wharton's Criminal Law*, ch. 21; *U. S. v. McKinley*, 126 Federal Reporter, 242; *Dealey v. The United States*, 152 U. S. 539; *United States v. Stevens*, 44 Fed. Rep. 132, 141; *State v. Straw*, 42 N. H. 393; *Reinhold v. State*, 130 Ind. 467; *People v. Clarke*, 10 Mich. 314; 8 *Cyc.* 664, 666.

We are of opinion that the third count charged the defendant with a common law conspiracy and sufficiently informed him of the crime charged. The objection against it is purely technical, as it is not pretended that he was in the slightest degree injured or prejudiced by the general and indefinite description of the property, the destruction of which is charged to have been the object of the conspiracy. On the contrary, the record shows that he was well informed as to the accusation against him.

Nor can we discover any necessary repugnance between the verdict of guilty on the third count, and the verdicts of acquittal on the seventh and eighth counts. In those counts the object of the conspiracy was alleged to be "to injure and destroy the property and dwelling house of Joseph Di Giorgio." The jury might have very reasonably concluded that while the evidence, in their judgment, did not fully support the allegations of these counts, it did satisfy them that it was the purpose of the accused to injure and destroy some of Mr. Di Giorgio's property. We must conclude that they were so convinced by the verdict of guilty upon the third count and the acquittal upon the others. The sufficiency of the evidence was a question for the jury, and this Court upon a motion in arrest of judgment has no power to review their finding. We said in *Hiss v. Weik*, 78 Md. 446, that, "as an appellate Court we cannot review the findings of the jury upon matters of fact, nor can we pass upon the comparative weight of the conflicting evidence submitted to them. If no error of law had been committed by the inferior Court in any of its rulings, the verdict of the jury, whether right or wrong, just or unjust, and even though it be directly against and in the very

teeth and face of the preponderance of evidence, cannot be interfered with here; and there is no power lodged elsewhere to set the verdict aside, except with the judge before whom the case was tried." Much that was said in argument in support of the motion in arrest of judgment cannot be considered by this Court; but could have been appropriately addressed to the trial Court upon an application for a new trial.

It is insisted by the appellant that the indictment, trial, verdict, judgment and sentence violate the Sixth, Eighth and Fourteenth Amendments of the Federal Constitution, and the Sixteenth and Twenty-first Articles of the Maryland Declaration of Rights. The Sixth Amendment provides that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation; and the Fourteenth declares that no State shall deprive any person of life, liberty or property without due process of law. Practically the same declarations are found in the Twenty-first and Twenty-third Articles of the Declaration of Rights of this State. The object of these provisions was to declare and secure the pre-existing rights of the people as those rights had been established by usage and the settled course of law. We take it to be settled that when a person accused of crime within a State is subjected, like all other persons, to the law in its regular course of administration in the Courts of justice, he cannot be heard to say that the proceedings and judgment were without due process of law, because law, in its regular and orderly administration through the Courts, is due process of law within the meaning of the constitutional provision, and when the rights of the citizen are thus secured by the law of the State the requirements of the Federal Constitution are gratified. Having hereinbefore held that by the law of this State the third count of the indictment is sufficient, it necessarily follows that the appellant has been deprived of no right secured to him either by the Twenty-first Article of the Maryland Declaration of Rights, or the Sixth or Fourteenth Amendment of the Federal Constitution.

It is urged that the judgment should be reversed because it

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constitutes a cruel and unusual punishment in violation of the provisions of the Maryland Declaration of Rights and of the Constitution of the United States. In support of this contention the appellant relies upon the Eighth Amendment of the Federal Constitution, which forbids the infliction of cruel and unusual punishment; and upon Article sixteen of the Maryland Declaration of Rights, which declares that no law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time hereafter. To dispose of this question we must understand the real crime of which the accused was charged. Di Giorgio was a prominent business man living in Baltimore City and engaged in the importation of fruit to the Baltimore market. He lived with his wife and family at Walbrook. In order to extort money from him threatening letters demanding money were sent him by an organization or society of men known as "The Black Hand." He declined to comply with these demands, and on the night of December 10, 1907, a dynamite bomb was placed in the rear room of his dwelling house and exploded, terrorizing the occupants of the house and causing much damage. Whatever may have been the motive which prompted this act, whether it was an attempt to murder Di Giorgio and his family in revenge for his refusal to pay over money in response to demands made upon him, or had for its ultimate purpose the coercion of Di Giorgio by personal violence into a compliance with these demands, there can be no two opinions as to the heinousness of the crime. It was an act characterized by the most malicious and diabolical wickedness, and should be punished with the greatest severity. We do not think that a sentence of ten years for such a crime would be open to any constitutional or other objections. In the case of *Mitchell v. The State*, 82 Md. 527, where the accused had been sentenced to jail for a term of fifteen years upon a conviction for an assault with intent to commit a rape, this Court passed upon the very question now before us, and held that the sentence was not a cruel and unusual punishment within the constitutional prohibition. It is said in that case that "our

law inflicts pain not in a spirit of vengeance, but to promote the essential purposes of public justice. Severity is not cruelty. The punishment ought to bear a due proportion to the offense. Crimes of great atrocity ought to be visited with such penalties as would check, if not prevent, their commission. It is impossible in the abstract to mark the boundaries which separate cruelty from just severity. If the circumstances which accompany the crime are of unusual aggravation, the punishment ought to be unusually severe. But the Courts must adopt the methods of punishment prescribed by law. No one ought to imagine that in a free country a Court would have the power to devise new and singular modes of punishment. Its duty is *dicere non facere legem*. Even where the law confides to the judge the imposition of the sentence without definite limit, it still may be possible to violate the declaration of rights. If the punishment is grossly and inordinately disproportionate to the offense, so that the sentence is evidently dictated not by a sense of public duty, but by passion, prejudice, ill-will or any other unworthy motive, the judgment ought to be reversed and the cause remanded for a more just sentence." While the sentence in this case is severe, it is not open to the objection of being in the sense of the law cruel or unusual.

We cannot review the action of the lower Court in refusing to require the State to elect between certain counts and in overruling the appellant's demand for a bill of particulars. Those motions were addressed to the sound discretion of the Court, and its action upon them is not the subject of an appeal in the absence of some gross abuse of discretion in the lower Court resulting in injury to the accused, and we find nothing of that kind in this case. *Warren v. Twiller*, 10 Md. 39; *Gibson v. The State*, 54 Md. 453. In *Gibson's Case* it is said: "No question has been raised in this Court to the refusal of the Court below to compel the State to elect on which count the prisoner should be tried. The practice is well settled in this State that such a motion is addressed to the discretion

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of the Court, and is not a subject of appeal or writ of error. *State v. Bell*, 27 Md. 677."

It is unnecessary to multiply authorities on this question, as they are practically unanimous in support of the doctrine stated by this Court.

2. This brings us to the consideration of the thirty-six bills of exception reserved by the accused to the rulings of the trial Court upon questions of evidence. We have given these careful consideration, but we do not think it necessary to discuss them all separately. We find no reversible error in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-sixth, twenty-seventh, twenty-eighth and twenty-ninth exceptions. There was, however, serious error committed by the Court in the sixteenth, twenty-fifth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth and thirty-sixth exceptions. The State relied largely upon the testimony of Tamburo and Lupo to connect Lanasa with this crime. Both were under indictment, and upon the uncorroborated evidence of accomplices, connecting Lanasa with the crime, the law does not permit a conviction to stand. *Wharton's Crim. Evidence*, 8th Ed., sec. 441-442.

Lupo pleaded guilty and turned State's evidence, in the hope and expectation of a light sentence, and in this he was not disappointed. According to his own testimony, he was induced to become a witness for the State by a statement made to him by the State's Attorney. He testified: "As a result of my having plead guilty and turning State's evidence I get from the State a request or beg the Court to give my liberty in order to take care of my family and provide for my family. I was forced to declare myself guilty because I knew all about it. I do not know how much the State's officers will endeavor to reduce my sentence for having plead guilty to the eighth count; I do not know anything; the Court knows when the prosecuting attorney will ask the Court; whatever they

will give me I do not know anything about it. All the State's Attorney told me is this: That if you will tell us what you know—we don't want any lies from you—but if you tell us what you know we will ask the Court to sentence you to eighteen months. I pleaded guilty before the State's Attorney spoke to me about these things; before he ever told me anything about it I pleaded guilty. *The State's Attorney promised me if I plead guilty that he would ask the Court to give me eighteen months; he didn't tell me he would give me eighteen months, but he would ask the Court to give me eighteen months.*" He testified to facts which, if believed by the jury, not only connected Lanasa with the crime, but which showed that he was the head and front of the whole conspiracy—the originator and master spirit of the whole nefarious business. After Lanasa's conviction the State confessed a plea of not guilty against Tamburo, who also had testified to certain things which will be presently alluded to, which tended to show Lanasa's participation in the crime.

The appellant testified in his own behalf, asserting his innocence and denying all the acts imputed to him by the State. It is, therefore, perfectly obvious that the result of the trial resolved itself into the question of the credibility of Lupo and Tamburo. The question of the appellant's liberty seems to have depended upon his ability to break down the evidence of these two men by convincing the jury that they were attempting, for selfish purposes, by false and perjured testimony to secure his conviction of a crime of which he was entirely innocent. In this situation it was vitally important to the appellant that all testimony legally admissible to weaken the force and affect the credibility of these witnesses should have been submitted to the jury. He had a right to show that they had made to others contradictory statements as to the material facts testified to by them at the trial. This was the object of the proffered evidence embraced in the sixteenth and twenty-fifth exceptions. "When a witness has testified to any matter of fact material to the issue, about which he has made a different statement to oth-

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ers, such statement, if denied by him, may be given in evidence to discredit or impeach him. *Munshower v. The State*, 55 Md. 21."

The sixteenth exception was taken during the cross-examination of Lupo, who had pleaded guilty to the eighth count of the indictment, which charged an executed conspiracy, the overt act charged in that count being the explosion of dynamite which had been placed under and near the property and dwelling house of Di Giorgio, his plea of guilty to that count having been entered under the circumstances stated above. He testified fully to Lanasa's participation in the crime; had told of certain meetings of himself, Lanasa and Rei in Pittsburg, and of the circumstances under which he had come to Baltimore and the object of his visit; but claimed that he was not present when the dynamite was exploded. He testified that Lanasa said in Pittsburg to Rei: "That a bomb ought to be throwed into the house of Mr. Di Giorgio, of Mr. Joseph Di Giorgio;" that Lanasa said to witness: "Come to Baltimore, as I want to put a bomb in the house of Di Giorgio;" that Lanasa gave him ten dollars to come to Baltimore "to put the bomb into the house of Mr. Di Giorgio;" that he told Lanasa that he was not good for that kind of business, and that Lanasa said he had two other men; that he would give me two other men to do the business." He further testified that he reached Baltimore on the 11th of December at four o'clock in the morning, and went to a hotel and remained there until about nine o'clock A. M. of that day; that he afterwards saw Lanasa and told him that Rei was dead, and that the traverser said: "My best friend was killed in Pittsburg, and I have sent two men to rob the house of Joseph Di Giorgio." "I did not say, 'rob the house.' The interpreter misunderstood me. He told me: 'My best friend, Philipi Rei, was killed in Pittsburg, and I have sent two men to blow up the house of Di Giorgio.'" He further testified that he went that day to the house of Lanasa, who took him upstairs, and that Lanasa there, in the presence of two people, repeated again: "My best friend was killed in Pitts-

burg, Philipi Rei, and I have taken two young fellows and sent them to blow up the house of Joseph Di Giorgio;" that he came here for the purpose of blowing up the house, and learned after he reached here from Lanasa that the house had been blown up. Lupo, on the 10th of January, 1908, in Cleveland, Ohio, had made a written statement of his participation in the crime in the presence of Captain A. J. Pumphrey and two other officers. In this statement, which is called in the record a confession, he stated that he heard Lanasa say to Rei: "I wish you would come to Baltimore tomorrow. I want to blow up Di Giorgio's house and kill him;" that in the upstairs room of Lanasa's house in Baltimore, Russo said: "They have killed Rei; now we will blow up Di Giorgio's house with dynamite and kill Di Giorgio." "Tony Lanasa also said this same remark as Russo did;" that Lanasa said he had sent two men to blow up the house.

In order to lay the foundation to discredit and impeach this witness, by showing that he had made certain statements tending to exculpate Lanasa from all connection with the crime of which he was accused, counsel for Lanasa asked the witness the following question: "Did you not at the City Jail on Thursday, March 26th, 1908, about 8 o'clock A. M., say to Mr. George Penniman and Mr. Harry Wolf that you were not guilty of the charge against you?" This question was objected to by the State, and the Court ruled that before the question should be permitted to be propounded to the witness the nature of the relationship existing or attempted to be created by Messrs. Penniman and Wolf on the occasion of that visit should be more clearly established. Mr. Penniman was then called and testified as to the object of his visit to Lupo in the City Jail, and give the circumstances under which certain statements were made to him by Lupo. At the conclusion of Mr. Penniman's evidence the counsel for Lanasa propounded to the witness the following questions: "Did you at the City Jail on Thursday, March 26th, 1908, at about 8.30 A. M., say to Mr. George Dobbins Penniman and Mr. Harry Wolf: That you were not guilty of the

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charge against you? That your attorneys wanted you to plead guilty, but that they could not fool you and that you were not going to do anything like that? That they were trying to take your life? That the confessions were not true? That after you had talked with Dimarco for an hour and a half he went out with his tail between his legs? That all in the papers about pleading guilty was not true, as no one could talk for you? That after they took you to Court you would cry out in Court 'that Mr. Dimarco was not my lawyer, but I want Mr. Wolf'? That subsequently at the end of the conversation you asked Mr. Penniman and Mr. Wolf to meet you at the jail at 8.30 A. M., Saturday, March 28th, when you would employ them as your counsel and give them your defense? And that you wanted to stand trial?"

Upon objection by the State the Court refused to permit the witness to answer. The record states "To which offer, as so made, the State objected, and the Court sustained the objection, and refused to permit the defendant to prove said offer." The trial Court treated the statements made by Lupo to Mr. Penniman as confidential communications between attorney and client. We cannot so consider them. We have been referred to no case, and we have been unable to discover one, in which statements made under the circumstances disclosed by the record have been held to be privileged, and it would be an undue extension of the doctrine to hold it applicable to this case. The subject of confidential communications between attorney and client has been fully treated by this Court. The result of the authorities is that to make the communications privileged they must be made during the existence of the actual relation of attorney and client, or during interviews and negotiations looking to the establishment of such a relationship between the parties, and must relate to professional advice and to the subject-matter about which such advice is sought. When such conditions exist the law will not permit the counsel to divulge the communications without the consent of the client. In *Chase's Case*, 1 Bland, 222, the Chancellor said: "The policy of the law does not

permit a solicitor to divulge the secrets of his client. Such confidential communications are not to be revealed at any period of time, either before or after the suit has been brought to an end, or in any other case; for, as to all such matters, his mouth is shut forever." The same principle is announced in *Chew v. Farmers' Bank*, 2 Md. Ch. 240; *Fulton v. MacCracken*, 18 Md. 543. In *Chew's Case*, *supra*, the Chancellor said: "But, although the rule is thus inflexible in the cases to which it applies, there are what are sometimes called exceptions to it, although these exceptions are rather apparent than real, and will, I think, be found upon examination to be entirely without the principle upon which the rule rests. That is, they will be found, not to be communications from the client to the legal adviser at all, but information which the latter had acquired independently of any such communication. And when that is the case the interests of justice, so far from requiring that it shall be locked up in the breast of the attorney, demand its publicity when necessary to guard or to assert the rights of the third persons."

The record shows that Mr. Penniman, who was counsel for Lanasa, had heard that Lupo was being subjected in the jail to some improper treatment. The evidence does not show the exact information conveyed to him; but it caused him to think that some improper influence was being used upon the prisoner—"that something was being done which should not be done," and he wanted to get at the bottom of it and see what the trouble was. That he did not go there as counsel for Lupo and had no thought of such employment, and it was not pretended by Lupo that he regarded Mr. Penniman as his counsel or legal adviser at any time, and as a matter of fact he was never so employed. During the interview which took place under these circumstances, Lupo, it is said, made the statement referred to in the questions embraced in this exception, and Mr. Penniman testified that at the time they were made the relation of lawyer and client did not exist, nor was such a relationship mentioned in any way, nor had it occurred to him. This is undisputed. But "after every-

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thing was said," to use the language of Mr. Penniman, the question of his employment was broached, and an arrangement was made that he should return on the following Saturday, when Lupo "would give us his defense." He did go to the jail on Saturday, but Lupo declined to see him, and never did give him his defense so far as the record shows.

We think it clear that the facts do not bring these statements within the rule as to confidential communications. The witness should have been required to answer, and if he had denied the statement attributed to him, Mr. Penniman should have been permitted to contradict him, if he could do so, as such evidence would have had a direct tendency to discredit the witness upon a most material point in the case, viz, the connection of Lanasa with the conspiracy.

For precisely the same reason there was reversible error in the ruling on the question embraced in the twenty-fifth exception. Joseph Tamburo, one of the defendants, had testified to certain facts tending to show the guilt of the appellant. Among other things, he swore that he was present in the upper room of Lanasa's house on the occasion testified to by Lupo and heard the appellant say that he had sent two men to blow up the house of Di Giorgio. The defense proposed to contradict him upon this point by two witnesses, by showing that Tamburo had stated that he was not present at Lanasa's home on the occasion testified to by him and Lupo, and that he knew nothing about the trouble. Such testimony was clearly admissible, and its exclusion was well calculated to do the appellant injury.

The thirtieth to the thirty-sixth exceptions inclusive present substantially the same questions. The testimony of Joseph Tamburo had been contradicted, and for the purpose of supporting his credibility he was recalled by the State in rebuttal. *Thirty-nine days after the commission of the crime*, and while he was in the custody of the police department of Baltimore City, he made to F. P. Di Maio, the superintendent of Pinkerton's National Detective Agency, in the presence of three members of the Baltimore City De-

tective Department, a statement which was reduced to writing and sworn to by him before a notary public. This statement, over the objection of the traverser, was admitted in evidence in corroboration of Tamburo's testimony in chief. If it be conceded that the statement is not excluded by *section 3, Article 35, of the Code of 1904*, we are of opinion that such a statement by one jointly indicted with the appellant for the identical crime for which he was being tried, made so long after the commission of the offense and under the circumstances disclosed by the record, does not fall within the exception to the general rule "which excludes mere hearsay evidence, because *ex parte* and without the sanction of an oath." The rule which admits such testimony in corroboration of the evidence of an impeached witness is one which is "not very generally recognized in the Courts of England, or of other States in this Country, and it should not be *extended*, but *applied strictly*. *Maitland v. Bank*, 40 Md. 559." In all the cases in this Court in which such evidence has been admitted it appears that the corroborating statement was made immediately, or soon after the transaction. *Cooke v. Curtis*, 6 H. & J. 93; *Washington Fire Insurance Company v. Davison*, 30 Md. 105; *McAleer v. Horsey*, 35 Md. 464; *Maitland v. Citizens' Bank*, 40 Md. 559; *Bloomer v. The State*, 48 Md. 537; *Mallonee v. Duff*, 72 Md. 286. In the case of the *City Passenger Railway Company v. Knee*, 83 Md. 78, we said: "Ever since the case of *King v. Parker*, 3 Doug. 242, it is well settled, according to the weight of authority, that 'what a witness says not upon oath, will not be admitted to confirm what he said upon oath.' *Robb v. Hackley*, 23 Wend. 55; *Conrad v. Griffey*, 11 Howard, 490. But though this is the general rule, the text writers agree that most Courts have held that there 'may be many cases where, under special circumstances, it possibly might be admissible; as, for instance, in contradiction of evidence tending to show that the account was a fabrication of a late date, and where, consequently, it becomes material to show that the same account had been given before its ultimate effect

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and operation, arising from a change of circumstances, could have been foreseen.' 2 *Starkie on Ev.*, marginal page 187; 1 *Wharton on Ev.*, sec. 570; *Rapalje's Law of Witnesses*, sec. 224; *Taylor's Ev.*, sec. 1330.

"This exception to the general rule seems to rest upon the theory that the witness, having been impeached by evidence showing that he has testified under corrupt motives, or has fabricated his testimony to meet the exigencies of the case, the fact that he uttered the same statement, shortly after the transaction, and before the motive to fabricate existed, tends to support not only his integrity, but also the accuracy of his recollection. To bring the case within this exception it must appear that the conversation occurred *soon after the transaction*, is consistent with the statements made on oath, and contains such fact or facts pertinent to the issues involved, as reasonably to furnish to the jury some test of the witnesses integrity and accuracy of recollection. And this is the rule that obtains in Maryland."

The appellant was accused of a crime of great atrocity; but he was entitled to all the presumptions and to all the safeguards which the law has provided for the protection of the personal liberty of the citizen. He was presumed to be innocent, and this presumption was an absolute protection against conviction and punishment until it was overcome by proof which placed his guilt beyond any reasonable doubt. This presumption attended him throughout all the proceedings against him from the beginning until his conviction after a fair and impartial trial. He had a right to be judged by the law of the land; and where it appears, as it does by this record, that he has been denied the benefit of substantial rights during the progress of the trial, it is the duty of this Court to reverse the judgment and award a new trial.

Judgment reversed and new trial awarded.

THEODORE COOK vs. JAMES B. COUNCILMAN.

*Description of Property in Mortgage—Adverse Possession—
Power of Appointment—Rule in Shelley's Case.*

A mortgage which conveys all the property which the mortgagor owns or holds any interest in, and all his right, title, interest and estate in a tract of land, is sufficient to convey the fee simple interest which the mortgagor had in the land by virtue of the Rule in Shelley's Case.

A purchaser may be required to accept a title to land which depends upon adverse possession.

A testator devised a tract of land to his nephew for and during the term of his natural life with power to dispose of the same by last will, and if the nephew should die without disposing of the same by last will, then the land was devised to the children which the nephew may leave living at the time of his death, their heirs and assigns forever; but if the said nephew should die without leaving a child or children or descendant thereof, and without disposing of the land by last will, then the land was devised to such person or persons as would, under the laws of the State of Maryland, inherit the same as the heirs of the nephew if he had died intestate seized in fee. *Held*, that this devise operates, under the Rule in Shelley's Case, to vest a fee simple title to the land in the devisee.

When land is devised to one for life with power of appointment by last will, and, in default of appointment, to his right heirs, the remainder limited to the right heirs becomes an executed fee in the life tenant under the Rule in Shelley's Case, subject to be divested by the execution of the power of appointment.

Decided February 11th, 1909.

Appeal from the Circuit Court for Baltimore County
(BURKE, C. J.,)

Md.]

Argument of Counsel.

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, WORTHINGTON and HENRY, JJ.

Archibald H. Taylor (with whom was *H. Webster Cook* on the brief), for the appellant.

The advocates for the adoption of the Rule in *Shelley's Case* first put forward the rule, without the least regard to the particular terms of the provision to be considered, and then use the rule as a Procrustean bed, to which the plain expressions of the donor must be enforced to conform, without caring how the donor's expressions are distorted, dismembered, shorn, and sacrificed, in order to fit them to their idolized rule. But it has to be remembered that, while the Rule in *Shelley's Case* is law in Maryland, it is no favored law or policy, but on the contrary it is an outlawed or prohibited outcast by statute in far the majority of the States in the Union by reason of its obnoxiousness to the sense of justice of such people, and our Courts have declared that it shall never be applied as a mere technical rule, to defeat the manifest expressions of the testator's will. *Chelton v. Henderson*, 9 Gill, 436; *Reilly v. Bristow*, 105 Md. 326.

The next interest given after the life estate is to the child or children of said nephew, their heirs and assigns forever, and is contingent upon such children of said nephew or their children surviving said nephew.

This clause, unless it coalesces with the gift to the life tenant, so as to merge with it and form an estate of inheritance in the nephew James, extending that life interest to a fee tail, and consequently by the terms of our statute a fee simple, stands complete as it appears upon its face, as above stated, a contingent fee simple interest by way of remainder to the children of the nephew, James B., the life tenant.

We are, therefore, right up against the question, and that question is in its essence, whether this gift to the child or children, or descendants of the children of James B. Councilman, Jr., their heirs, and is a gift by way of limitation or of purchase. The answer has been made in this State many a

times over, and in the shape in which appears here, the answer has been made in the same way in England, where the Rule in Shelley's Case was born.

The gift to children, *per se*, has a well-settled significance. The use of this word always or invariably imports purchase and excludes the idea of limitation. *Stump v. Jordan*, 54 Md. 628; *Reilly v. Bristow*, 105 Md. 326.

The case of *Stump v. Jordan* shows that even if the broader word than "children"—"issue"—had been used, and if the expression, "if my said nephew should depart this life without leaving a child or children or descendant or descendants of a deceased child or children living at the time of his death," served to convert the words used, "a child or children," into the equivalent of "issue," "issue" would still be a word of purchase and not of limitation. There is one special qualification which, if attached to the words "issue" or "heirs of the body," or even "heirs," always makes the taking one by way of purchase and not by limitation, and that is where the children, issue or heirs to whom the estate is given following the apparent life estate, are themselves made the starting point of a new inheritance. That is the case here: "If my nephew shall depart this life * * * then from and after his death I give and devise the same to the child or children which he, my said nephew, may leave living at the time of his death, their heirs and assigns forever."

It seems to us that this qualification or explanation of the word "heirs" which is here so clearly expressed, settles the whole case, for there is no doubt that it is the law of Maryland, and the line of cases laying it down are unbroken by any dissent whatsoever. These cases have been collected and affirmed as the law in Maryland by the Supreme Court of the United States, and which asserts, as the Maryland cases also assert that this is the prevailing rule of the English authorities.

The doctrine in *Ware v. Richardson*, 3 Md. 544, is that of the English case of *Luddington v. Kime*, and it was reviewed (But affirmed in *Shreve v. Shreve*, 43 Md., which in turn was

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reviewed and adopted by the Supreme Court of the United States in *De Vaughn v. Hutchinson*, 165 U. S. 556, and is the universal law of the land wherever the Rule in Shelley's Case is sought to be applied.

"The word 'heirs,' in order to be a word of limitation, must include all the persons in all generations belonging to the class designated by the law as heirs, but the devise here was to Martha Ann for life, and at her decease to her heirs begotten of her body, and to *their* heirs and assigns, a restricted class of heirs, and this limitation shows that it was the intention of the testator that Martha Ann's children should become the root of a new succession and take as purchasers and not as heirs." *De Vaughn v. Hutchinson*, 165 U. S. 580.

We repeat that this rule is even clearer and more controlling when the words of limitation are superadded to the words "issue" or its equivalent, rather than to the word "heirs." Additional cases in Maryland setting out this doctrine are as follows: *Horne v. Lyeth*, 4 H. & J. 435; *Fulton v. Harmon*, 44 Md. 263; *Clark v. Smith*, 49 Md. 117; *Henderson v. Henderson*, 64 Md. 185; *Stonebraker v. Zollickoffer*, 52 Md. 154.

The same decision was reached in *Kuntzleman's Appeal*, 136 Pa. St. 152, where the will contained almost exactly the words of this latter clause. The same in *Earnhart v. Earnhart*, 127 Ind. 397.

Other cases to the same effect and all excluding the rule from application to a gift in the terms of this are *Martlin v. Martlin*, 55 N. J. Eq. 772; *Barges v. Thompson*, 13 R. I. 712.

The Court is especially prayed to consider the decision in *Evans v. Evans*, 2 Ch. Div. L. R. 173 (1892), where the limitation was to E. with an ultimate remainder, "to the use of such person or persons as at the decease of E. shall be his heir or heirs at law and to the heirs and assigns of such persons," which decision shows how fully after some debate the decision in *Luddington v. Kime* has been recognized as law in England, and that the law of England, where this rule

originated, is in full harmony with the law of Maryland and the law of all the United States where the rule is still in force.

After the gift, then, of the life estate to his nephew, James B. Councilman, Jr., with remainder to his children, what becomes of the gift over? Our answer is that the question has no bearing upon the case, but all its possibilities may be considered without disturbing the conclusion reached by the authorities quoted.

Of course, if the remainder to the children of James B. Councilman, Jr., had been a vested remainder, being in fee, there would be nothing left which could be the subject of a gift over, and it would be simply void, as was illustrated by the case of *Coombs v. Coombs*, 67 Md., page 11. But it was plainly contingent—contingent upon these children surviving their father. If they survived their father, of course this gift to them became vested and was exclusive, and there was nothing which could become the subject of the gift over. But the same moment, viz, the death of James B. Councilman, Jr., must necessarily determine the contingency, whether the gift would vest in the children of James B. Councilman, Jr., or whether it would fail them and the other contingency take effect, viz, whether it would pass to the persons designated in the gift over. Therefore it is plainly a contingency with a double aspect. It would seem that this second contingent estate is a contingent remainder rather than an executory devise, because it must necessarily vest immediately upon the determination of the life estate of James B. Councilman, Jr., if it is not excluded by the operation of the first alternative remainder in favor of the children of James B. Councilman, Jr. But it does not make any matter whether it is a contingent remainder or whether the persons who shall take under it would, except for the terms of the intervening estate, which undoubtedly, as aforesaid, convey an estate by purchase, meet the requirements of those who take by limitation rather than by purchase. Inasmuch as it is merely part of a gift or an alternate gift to one which is plainly charac-

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terized as by purchase, it would seem necessary to make this portion or alternative also one by purchase, and in fact where the term has been before this Court it was so determined to be. See *Handy v. McKim*, 64 Md. 560.

Of course, no claim can possibly be made that this second alternative contingent remainder in fee can be considered by itself in connection with the original gift of the life estate to James B. Councilman, Jr., to work a merger so as to exclude the first alternate gift in fee, if the first alternate gift in fee be a valid one, *i. e.*, not obnoxious by reason of the violation of any rule of perpetuities or other public policy. We would have no right, of course, to exclude the first estate from consideration, and of course it is a well-known requisite of a merger that the remote and larger estate cannot coalesce with the previous estate so as to cut out any intermediate contingent estate created by the same act which created the other estates. *Preston on Merger*, page 110.

In a word, if the gift to the children of James B. Councilman, Jr., which is, as we have above described it, the *second* gift in point of persons and time of the whole complete exhausted gift which the testator in that will makes of the estate called "Woodhome," is a valid remainder upon a contingency to those children, there is no occasion for this Court now to discuss, nor will there ever be occasion to discuss whether the second or alternative contingent estate comes to the persons designated to receive it as a contingent remainder or an executory devise or by way of purchase or by way of limitation.

J. J. Alexander and *W. R. Townsend* filed a brief for Alice M. Cockey, a presumptive heir and creditor of James B. Councilman.

1. It is said that under the Rule in *Shelley's Case*, James B. Councilman did take an indefeasible estate in fee simple in the tract called "Woodhome," and that consequently the appellant takes the clear title in fee, which cannot be disturbed by any child James B. Councilman may leave nor by the exercise of his testamentary power.

But the law is laid down in *Fearne, Contingent Remainder*, ch. 1, sec. 5, sub-sec. 6, to the contrary: "The general rule of law respecting the subsequent limitation to the heirs of the body and vesting in the ancestor where he takes a preceding freehold by the same conveyance does not operate so absolutely as to merge the particular estate of freehold where the limitations intervening between the preceding freehold and such subsequent limitation to the heirs, etc., are contingent because that would destroy such intervening limitations, but the two limitations are united and executed in the ancestor only until such time as the intervening limitations become vested, and then open and become separated in order to admit such intervening limitations as they arise. Thus, where there was a limitation to baron and *feme* for their lives, remainder to the first and other sons of the marriage successively in tail—remainder to the heirs male of the bodies of the baron and *feme*—the Court resolved that it was an estate tail executed in the baron and *feme*, *sub modo*; that is, so as not to merge the estates for life absolutely, but executed only till the birth of the first son; and that then the estates should become divided by operation of law, and the baron and *feme* become tenants for their lives with remainder to their first and others sons, remainder to baron and *feme* in tail." 11 Rep. 80, *Lewis Bowles' Case*.

If, therefore, James, the devisee, should leave a will disposing of the property, or if he should die intestate, leaving issue living at the time of his death, the supposed contingent remainder to his heirs would be void.

With respect to his testamentary power, it was held by this Court, in 60 Md. 64, *Wilks v. Burns*, that the donee of a testamentary power could not by any *mesne* contract fetter the power, "for," says the Court, "the donor intended that it should remain under the control of the donee until the moment of his death." And consequently the nephew here may exercise his power at any time during his life and defeat any *mesne* incumbrances imposed by him on the estate after his life estate.

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Argument of Counsel.

2. The Court below held that the Rule in Shelley's Case applied to the devise of "Woodhome" to James B. Councilman, and that he therefore took an estate in fee.

It cannot be denied that in 9 Gill, 432, *Chelton v. Henderson*, the Rule in Shelley's Case as applicable to devises in Maryland received a severe shock, and in 105 Md. 326, *Reiley v. Bristow* (see 44 Md. 251, *Fulton v. Herman*), this Court has said that "the Courts of this State have always struggled against the application of the rule, and have searched the will or deed for some inconsistent provision or word which would exclude the application."

Now, in the first place, in order to try whether the rule applies, it is first necessary to construe the instrument in question as if such a rule did not exist. This is explained in (1892) 2 Ch. 173, *Evans v. Evans*.

Now, we find as to this will that where the testator intended to give a fee simple, he knew how to express himself in proper terms. In this very clause the gift to the children of James B., Jr., in default of the exercise of his power by him, is to his child or children * * * "their heirs and assigns forever." So his gift of his residue, real and personal, in the tenth clause of the will, is to his nephews, Charles and William T., "their heirs, personal representatives and assigns." And in the third clause he gives farm, chattels and furniture, etc.—*i. e.*, perishable articles—to his nephew, J. B., by the appropriate term "absolutely" in contrast to the gift to him of the land for his life. Again, in the annuities bequeathed by the fourth and fifth clauses of his will he directs them to be paid by his nephew, James B., Jr., during his life, and the annuities are commuted after his death and made charges, as they are in his lifetime, upon the farm "Woodhome," "to whomsoever the same may then (*i. e.*, at the death of James B., Jr.) belong," these gifts being striking indications of his intent that James B. should only have a life estate in "Woodholme." And if the words, "*to whom the same may then belong*," in case of the appointees, if any, under the power or in the case of children or descendants of

James B., Jr., under the gift to them if he should leave issue, signify, as they must do, persons taking by purchase, the same construction must be put on the words "heirs" in the ultimate gift over. When he comes to the gift over, in default of the exercise of the power and of issue of James B., Jr., we would expect that if he intended the "heirs" of James B., Jr., in the same sense as he intended the "heirs" of the children of James, Jr., in the gift to them and the "heirs" of his nephew, Charles and William, in the residuary clause of his will, he would have used the same expression, and no reason can be suggested why he did not, except that he did not intend the word "heirs" on the gift over in the second clause in the same sense as in the other cases. If so, it is the same as if he had used a different word than "heirs."

Again, the words in the ultimate gift over in the second clause are that in the events mentioned, "I (the testator) give and devise said farm to such person or persons as would under the laws of the State of Maryland inherit the same as the heirs of my said nephew if he had died intestate seized in fee thereof."

Is this clause the same as if the testator had said simply that in the events mentioned, "I give and devise the same to the heirs of my said nephew"?

First, the expression is different. It is given to "such persons as *would* inherit as his heirs *if he had died intestate seized thereof*"—which words negative the idea that he could or would in fact die seized thereof, and are not positive but similitudinary, and consequently point not to a line of succession, but to individuals who should occupy a certain relation to him at the time of his death. Laying the Rule in Shelley's Case aside, as we must do in construction of the will one would say that the testator meant to "describe and did describe" the "person or persons" who were to take in the event of the failure of his previous gifts, which is exactly the "*descriptio personarum*" of the taker, which excludes the application of the Rule in Shelley's Case. He describes them as those who would inherit as heirs of his nephew upon a suppo-

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sition, which is contrary to the fact, else there would be no need of the supposition.

"If," says the testator, "the tenant for life dies childless and intestate (he having a testamentary power). I give the property to the person or persons who would have taken from him as his heirs if he had died intestate, and tenant in fee;" and a man's heirs are included in himself, which is the reason of the Rule in Shelley's Case, but here that cannot be said, since not his heirs generally, but those persons only who fit a particular description at his death, which is necessary to create their right.

In this we add the terms of the express gift to the nephew for life and next the testamentary power; although these by themselves would not be conclusive, yet it has never been denied that in conjunction with other circumstances or other language used by the testator, they ought to, and do have an important effect. Besides the ultimate limitation under the Rule in Shelley's Case must be to the heirs of the person having the life estate as a class, meaning "heirs" in the common meaning of "all the heirs." But the "heirs" of the nephew, according to the common meaning of the term, have been provided for, and the limitation deals only with his collateral heirs, because his issue are supposed entirely extinguished. And, lastly, the ultimate limitation is by way of executory devise. *Fearne, Contingent Remainders*, 296; *Prec. in Ch.* 72, *Lloyd v. Carew*.

No remainder can be limited after a remainder in fee. A contingent remainder in fee may indeed be limited in substitution for another contingent remainder in fee. This is called a contingency with a double aspect. Such remainders are, however, concurrent with each other, and not consecutive, and not remainders one upon the other, and must be of the same quality and nature—*i. e.*, if one is to a purchaser, the other must also be. But a consecutive or subsequent contingent remainder in fee cannot be limited upon another contingent remainder in fee. Therefore the ultimate limitation here is an executory devise, to which the Rule in Shelley's

Case does not apply. For the estate to be created under the power may be one contingent remainder in fee; the devise to the children of his nephew and their heirs another contingent remainder in fee, and to make the ultimate limitation a contingent remainder would create "a contingency with a treble aspect."

But the estate is to go to those persons who would under the laws of Maryland inherit, etc. Now the Code, Article 40, Inheritance, section 1, provides as follows: "If any person seized of an estate in lands, or in this State in fee simple or fee simple conditional, or an estate in fee tail general, shall die intestate thereof, such lands, tenements and hereditaments shall descend in fee simple to the kindred male and female of such person in the following order, etc.:"

First, to the child or children, and, if none, and the estate descended on the part of the father, then to the father, etc. But if the estate shall vest in the intestate by purchase, etc., it goes in default of children in a different manner.

To which set of heirs, assuming we would apply the Rule in Shelley's Case, would the estate go? The children of the nephew are excluded and he is not actually seized, but only supposed to be seized in fee of the land, but it does not appear how. In all properly drawn instruments where the draftsman has to resort to the roundabout expression used in this will the phrase is always as if he had died seized of an estate in fee by descent or an estate in fee by purchase. The distinction is important, and the result is that as it cannot be known who are the heirs, whether one set or the other (children and descendants of the nephew being excluded by the direct devise to them), the ultimate devise over is void for uncertainty and the property would descend as a void devise to the heirs of the testator. *Tongue v. Nutwell*, 13 Md. 412; *Handy v. McKim*, 64 Md. 560; *Bradley v. Cartwright*, L. R., 2 C. P. 511.

3. To look now at the authorities. In *Handy v. McKim*, *supra*, it was held that a similar expression to that used in this will did not carry the fee because the word "heirs" was omitted, though it cannot be denied that the expressions used

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was equipollent, but for distinction suggested by the Court.

In 127 Ind. 397, *Earnhart v. Earnhart*, the clause was to W. E. for life with remainder in fee to the "persons who would have inherited the same from W. E. had he owned the same in fee at the time of his death," and it was held that it unequivocally appeared that the remaindermen were not to take as heirs of W. E., and so is 131 Penn. St. 152, *Kuntzleman's Appeal*.

But what appears to be a strong authority on the subject is (1892) 2 Ch. 173, *Evans v. Evans*. There by deed land was limited to the use of E. for life, with an ultimate limitation to the use of "such person or persons as at the decease of the said E. shall be his heir or heirs at law, and of the heirs and assigns of such person or persons." And it was held that the Rule in Shelley's Case did not apply, and that E. took, not an estate in fee simple, but merely a life estate, with a contingent remainder in fee to the person or persons who at his death answered the description of his or her heirs at law. The whole subject is investigated so thoroughly in this case that it would be wrong to do more than refer the Court to it.

4. But the creditors are not without remedy. For by 3 and 4 W. & M., c. 14, the Statute of Fraudulent Devises, *Alexander's British Stat.* 573, the second section of this Statute avoids all testamentary dispositions whereof the testator at the time of his death was seized in fee in possession, reversion or remainder or over which he had a general power of appointment whereby creditors might otherwise be defrauded. We refer to the note in this Statute and insist that the Woodholme farm on the death of the nephew would be assets for the payment of his debts.

William S. Bryan, Jr. (with whom was *D. G. McIntosh* on the brief), for the executor of Sadie C. Councilman.

Under the Rule in Shelley's Case, the limitation in the will gave an estate in fee simple to James B. Councilman. It gave him the property for life, with power to dispose of the

same by will, and if he did not dispose of the same by will it gave the property, after his death, to precisely the same class of persons, in precisely the same order, and with precisely the same tenure, as they would have taken as James B. Councilman's heirs. This, under the authorities, gave James B. Councilman, the first taker, the fee simple estate.

Fearne says that LORD THURLOW laid down the Rule in Shelley's Case thus: "That in all cases where the limitation was of an estate of freehold to a man, and afterwards to the heirs of his body (whether general or special), so as to give it to the heirs as a *denomination or class*, the heirs should be in by descent and not by purchase." *Fearne on Remainders*, mar. page 135. See also *Ware v. Richardson*, 3 Md. 544, 545; *Smith v. Clark*, 49 Md. 120; *Stump v. Jordan*, 54 Md. 630, 631; *B. & O. v. Patterson*, 68 Md. 609; *Brown v. Renshaw*, 57 Md. 67, 68; *Mason v. Ammon*, 117 Pa. St. 127; *Dickson v. Satterfield*, 53 Md. 321; *Sheely v. Neidhammer*, 182 Pa. St. 163; *Thomas v. Higgins*, 47 Md. 440; *Shapley v. Deihl*, 203 Pa. St. 566; *Lyles v. Digges*, 6 H. & J. 364, 370; *Reilly v. Bristow*, 105 Md. 326; *Simpers v. Simpers*, 15 Md. 160.

To the same effect is the ruling of the Supreme Court of North Carolina in the case of *Wool v. Fleetwood*, 136 N. C. 460; 67 L. R. A. 444.

Under the elder Mr. Councilman's will the devolution of the property is precisely the same as would have been if he had simply said that his nephew, James B. Councilman, was to take the estate in fee simple. In this latter event, James B. Councilman would have possessed the estate for life with power to dispose of it by will, and in the default of such disposition it would have gone to any child or children he might have left "living at the time of his death, their heirs and assigns forever, the child or children or descendants of any of a deceased child or children, or descendant * * * to take part to which the parent would, if living, be entitled. But if my said nephew should depart this life without disposing of said farm by his last will and testament, and without leav-

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ing a child or children or descendant or descendants of a deceased child or children living at the time of his death, then from and after the death of my said nephew, I give and devise said farm to such person or persons as would under the laws of the State of Maryland inherit the same as the heirs of my said nephew if he had died intestate seized in fee thereof." This estate so devised has all the incidents of an estate in fee, and, as JUDGE MILLER quotes from *Lord Cokes* "No man can institute a new kind of inheritance not allowed by law." (68 Md. 608.)

It is not the *name* by which the devise is called which affects its character. It is the incidents and the method in which the title shall devolve which determine the character and quality of the estate. See also *Waller v. Pollitt*, 104 Md. 172; *William v. Duncan*, 92 Ky. 125; *Childers v. Logan*, 65 S. W. Rep. 124; *Mason v. Ammon*, 117 Pa. St. 127; *Echols v. Jordon*, 39 Ala. 24; *Seeger v. Leakin*, 76 Md. 500-506; *Josetti v. McGregor*, 49 Md. 202; *Baird v. Brookin*, 12 L. R. A. 157, 158; *Fowler v. Black*, 11 L. R. A. 670.

BRISCOE, J., delivered the opinion of the Court.

James B. Councilman, of Baltimore County, on the first day of October, 1900, executed and delivered to Sadie C. Councilman, his wife, a mortgage of all his interest and estate in a tract of land called "Woodhome," situated in Baltimore County, to secure the payment of a promissory note for \$72,500.

A default having been made in the payment of the mortgage debt, the mortgaged real estate was sold under a decree of the Circuit Court for Baltimore County and purchased by the appellant for \$42,500. The sale was duly reported to the Court below for ratification.

To the report of sale, made by the trustees on the 29th of May, 1908, exceptions were filed by certain judgment creditors of Councilman, and also by the purchaser, the appellant.

There is no appeal from the order of ratification of sale on

the part of the creditors, and their exceptions will not be considered.

The exceptions of the appellant raise three objections to the title to the property. First, it is contended that James B. Councilman only had a life estate in the property, and he only intended to charge the same, consequently the decree to sell and foreclose cannot vest in the purchaser anything more than an estate for his life. Second, that in a small part of the land sold, to wit, two acres thereof, there is an outstanding leasehold interest, under a lease dated December 28th, 1812; and third, that James B. Councilman did not have a fee simple title to "Woodhome," the property sold. And from an order of the Circuit Court for Baltimore County overruling the exceptions and ratifying the sale, the purchaser has appealed.

As to the first exception, we need only say it is clear from the language of the mortgage itself that its purpose and effect was to convey whatever estate the mortgagor had in the property. The mortgage was executed in pursuance of an agreement contained in a promissory note dated October 2, 1899, given by Councilman to his wife, to the following effect: "To transfer to Sadie C. Councilman, as security for the payment of said note *all right and interest* the said James B. Councilman should own or hold in and to *any real* or personal property, whenever the said Sadie C. Councilman should demand the same." It is also certain from the terms of the mortgage, dated Oct. 1, 1900, it was intended to embrace whatever interest the mortgagor had in the real estate.

The mortgagor conveyed "all and every part of the property, real and personal. * * * which he owns or has or holds any interest or right in or to of any nature, kind or description whatsoever and wherever the same may be, especially including all his right, title, interest, estate and claim in and to that tract of land known as 'Woodhome Farm' situated in the Third Election District of Baltimore County." To have and to hold such of the aforesaid property or inter-

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est therein, as may be owned by the said James B. Councilman in fee, to the said Sadie C. Councilman, etc.

The second exception is also without merit. It appears from the evidence that the mortgagor and his predecessors in title had been in adverse and exclusive possession of all the land in question for more than forty-five years, and that the alleged leasehold interest is barred by limitations. A title by adversary possession is therefore clearly established in that part of the land in dispute. *Allen v. Van Bibber*, 89 Md. 436; *Lurman v. Hubner*, 75 Md. 268.

The third exception presents the important question in the case, and that is, whether James B. Councilman owned the property called Woodhome in fee simple, so that the appellant as purchaser under the mortgage acquired a valid title thereto. And this depends upon whether James B. Councilman under the will of his uncle, the elder Mr. Councilman, acquired a fee simple estate in the property here in controversy and known as "Woodhome."

The property was devised by the following clause of the elder Mr. Councilman's will: "I give, devise and bequeath to my nephew, James B. Councilman, Jr., the farm on which I now reside, known by the name of 'Wood Home,' and containing about two hundred and twenty acres of land, more or less, for and during the term of his natural life, with full power and authority to him, my said nephew, to dispose absolutely of the same, by his last will and testament duly executed. If my said nephew shall depart this life without disposing of the said farm by his last will and testament, then from and after his death I give and devise the same to the child or children which he, my said nephew, may leave living at the time of his death, *their heirs and assigns forever; the child or children or descendant or descendants of a deceased child or children of my said nephew to take the part to which the parent would, if living, be entitled; but if my said nephew should depart this life without disposing of the said farm by his last will and testament and without leaving a child or children or descendant or descendants of a deceased child or*

children living at the time of his death, then from and after the death of my said nephew, I give and devise said farm to such person or persons as would, under the laws of the State of Maryland, inherit the same as the heirs of my said nephew if he had died intestate seized in fee thereof."

It is urged upon the part of the appellee that this devise operates under the Rule in Shelley's Case to vest a fee simple title to the property in the mortgagor or devisee. And the appellant contends that the interest the devisee acquired was a mere life estate with limited powers.

Now in the construction of this devise, so far as the question here involved is concerned, the power of testamentary disposition given to Mr. Councilman need not be considered, because as was said by JUDGE ALVEY in *Brown v. Renshaw*, 57 Md. 78, it is now well settled that the mere power of appointment is wholly ineffective until the power be executed; and in case of a limitation to one for life, with power of appointment, and, in default of appointment, to his right heirs, the remainder limited to the right heirs will become an executed fee in the taker for life, under the Rule in Shelley's Case, subject to be divested by the exercise of the power. *Cunningham v. Moody*, 1 Ves. 174; *Doe v. Martin*, 4 Dunf. & East. 64.

It was also held in *Brown v. Renshaw*, *supra*, that a conveyance of the property in fee simple effectually extinguished and destroyed the power. *Webb v. Shaftesbury*, 3 M. & K. 599.

The devise in this case, then, is in effect to Councilman for life, and upon his death to his child or children, and their heirs, and in case of his death without leaving a child or children or descendants, then "to such person as would, under the laws of Maryland, inherit the same as the heirs of my said nephew, if he had died intestate seized in fee thereof."

The phrase in the will, "such persons as would inherit as heirs," has practically the same effect as if the limitation over had been merely to the "heirs of my said nephew." There can be no logical distinction between the heirs of Councilman

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and those persons who would inherit as his heirs if he had died intestate.

The land after the life estate is made to descend to precisely the same classes of persons as would take, if Councilman had been the owner in fee. The gift over is to his children or heirs as the line of succession.

In *Ware v. Richardson*, 3 Md. 544, this Court adopted the following definition of the Rule in Shelley's Case laid down in *Preston on Estates*, Vol. 1, p. 263, and approved by CHANCER KENT: "When a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and in the same instrument there is a limitation by way of remainder either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

While the Rule in Shelley's Case has been abrogated by statute in many of the States, it remains the law in this State and must be enforced. *Waller v. Pollitt*, 104 Md. 173; *Thomas v. Higgins*, 47 Md. 451.

It is a rule of law, and not of construction.

If it appears, upon the face of the will, that the limitation over after the life estate is to the heirs of the life tenant, and that they take as his heirs and not as purchasers, then, the rule applies as matter of law. In such case the particular intent that the first taker shall possess only a life estate might yield to the general intent that his heirs shall inherit from him.

Thus in *Simpers, Lessee, v. Simpers*, 15 Md. 187, it is said that there is no rule better established than that when there is a particular intent expressed in a will and a general intent inconsistent therewith expressed in the same will, the latter must prevail.

In *Jones v. Morgan*, 1 Brown's Ch. Rep. 206, LORD THURLOW said, that where the estate is so given that it is to go to every person who can claim as heirs to the first taker the word

"heirs" must be a word of limitation, all heirs, taking as heirs, must take by descent.

The word "children" used as a description of the persons who are to take after the life estate, is often construed to be a word of purchase and not of limitation. *Stump v. Jordan*, 54 Md. 628. But in the case of the devise now being considered the word "heirs" is used as well as the word "children," and that word is strictly one of limitation. The ultimate gift over to the heirs of Councilman in default of children indicates a general intent that the estate should descend to his heirs and operates to enlarge the effect of the word "children" antecedently used.

The limitation over, therefore, is to the children or heirs of the life tenant. The general intention of the testator was, that his nephew should be the root of succession from which future takers should come and that they should take as his heirs.

In *Shapley v. Diehl*, 203 Pa. St. 568, land was conveyed "to Shapley for the term of his natural life and at his death to his children or heirs." The Court in that case held that the phrase "children or heirs" means "heirs of the grantee of the life estate, the word 'heirs' being used as a synonym to enlarge and explain the preceding word, which might otherwise fail of its real intendment. The words, therefore, naturally and properly seem to express the intent that the donees in remainder should take not from the donor directly as purchasers, but in succession by inheritance from the grantee of the life estate." *Sheeley v. Neidhammer*, 182 Pa. St. 163; *Mason v. Ammon*, 117 Pa. St. 127.

We have carefully examined the cases cited by the appellant's counsel in their very able brief, but find nothing in them in conflict with the conclusion we have reached, and that is, this case falls within the Rule in Shelley's Case, and that James B. Councilman acquired under the will a fee simple estate in the farm called "Woodhome," devised under the will.

The sale being in all other respects valid, the purchaser at

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this sale will acquire the fee simple title to the property sold thereunder. Finding no error in the order of the Circuit Court for Baltimore County, passed on the first day of September, 1908, overruling the exceptions and ratifying and confirming the sale, it will be affirmed.

Order affirmed with costs.

JAMES W. RICHARDSON vs. BRUNER R.
ANDERSON, TRUSTEE.

*Set-Off—What Claims May Be Set Off Against Debt Sued for
by Trustee in Assignment for Benefit of Creditors—Evi-
dence—Admissions—Waiver—Instructions—Set-Off
Not Specially Pleaded.*

A person indebted to one who makes an assignment for the benefit of creditors cannot set off against his debt when sued by the trustee under the assignment claims against the assignor purchased by him after the execution of the assignment.

The trustee under an assignment for the benefit of creditors takes the property and rights of the assignor subject only to the equities which exist against the same at the time of the assignment. Consequently, when the assignment includes a claim against A. then due, A. cannot set off against that claim a debt of the assignor to him which did not become due until after the assignment.

A person who endorsed a promissory note for the accommodation of a party afterwards making an assignment for the benefit of creditors and who is called upon to pay the note after the institution of suit against him by the trustee under the assignment to recover a debt due by him to the assignor when the assignment was made is not entitled to set off against his debt the payment so made by him as accommodation endorser.

Although a statement from account books not proved to have been duly made is not competent evidence, yet, when a party has admitted the correctness of such statement, it is competent evidence as an admission against interest.

The mere fact that one has not enforced payment of a claim made by him for services rendered is not evidence that he had waived or abandoned the claim.

Defendant had been the manager of a corporation which made an assignment for the benefit of its creditors to the plaintiff. Defendant was indebted to the corporation on certain transactions, but claimed that he had rendered extra services to it upon the promise of the directors to pay for the same, which they had failed to do. *Held*, that a prayer offered by the plaintiff in an action to recover the amount of the defendant's indebtedness to the corporation should state what facts should be found in order to create the indebtedness.

Held, further, that a prayer offered by the defendant setting forth the rendition of services by him to the corporation and its agreement to pay therefor a reasonable compensation in addition to his salary, and declaring that if such fact be found by the jury, then the defendant is entitled to such sum as they may find to be a reasonable compensation, should not be modified by adding thereto, "unless the jury find that the defendant before the institution of the suit, waived or abandoned all claim for such compensation"—since there is no evidence in the case of a waiver.

While a set-off must be specially pleaded and evidence in support of it is not admissible unless so pleaded, yet, when such evidence has been produced without objection, and the prayers do not confine the right to recover to the pleadings and evidence, the jury may find the existence of a set-off in favor of the defendant.

Decided January 21st, 1909.

Appeal from the Baltimore City Court (NILES, J.)

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS and WORTHINGTON, JJ.

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Thomas Mackenzie and H. Findlay French, for the appellant.

W. Harry Holmes, for the appellee.

THOMAS, J., delivered the opinion of the Court.

The appeal in this case brings up for review the rulings of the Court below in sustaining plaintiff's, appellee's, demurrer to defendant's, appellant's, third, fourth and fifth pleas, in admitting the evidence in the first and second bills of exception, and the action of the Court on the prayers, and defendant's special exception to the modification of his prayer.

The Maryland Grain Agency of Baltimore City, a corporation, on the 27th of February, 1908, made a deed of trust for the benefit of creditors to the appellee. At the time of the assignment the appellant was the manager of said agency, and the appellee shortly after the assignment employed him to make out a statement of the assets of the agency from its books. After the statement was made out, he and the appellant went over it together, "and verified it with the books" of the agency. This statement showed that the appellant was indebted to the agency for the balance due on account between them to the amount of \$1,781.41, which the appellant, according to the testimony of the appellee, said was correct, with the exception of two items, one of \$72.44 and the other of \$138.00, which the appellee deducted, leaving a balance of \$1,541.71, and upon failure of the appellant to pay this balance the appellee, on the 9th of April, 1908, brought suit to recover it.

The defendant in his testimony states that while he was employed as bookkeeper for the agency, in 1895, at a salary of \$100.00 a month, he was employed by the agency to do extra work on its books, for which it agreed to pay him whatever such extra services were worth; that the agency never paid him; that the matter was brought up several times at the meetings of the directors, but each time it was postponed for future action and settlement; that such services were worth

\$500.00; that he had never said anything to the appellee about his claim for such extra services until the morning of the trial.

Defendant's first and second pleas were, never indebted as alleged, and never promised as alleged. His third plea, for defense on equitable grounds, states that the deed under which plaintiff claims was a deed of trust for the benefit of the creditors of the said agency, dated the 27th day of February, 1908, and that defendant holds the promissory note of said agency, dated July 1st, 1907, and payable six months from date, in favor of one George H. Merryman, for \$1,100.00, and by him indorsed to the defendant subsequent to the execution of said deed of trust, which he is entitled to have applied as an equitable set-off against the claim of the plaintiff. His fourth plea, for defense on equitable grounds, alleges that the deed under which plaintiff claims was a deed of trust for the benefit of creditors, and that the defendant, with George H. Merryman and Wm. Clement Brooke, indorsed a promissory note for \$2,500.00, dated December 14, 1908, and payable four months after date, drawn by the said agency in favor of itself, which note was on said date discounted by the Third National Bank of Baltimore City for the use of said agency; that said note was not paid and was protested, and that the defendant and said Merryman were called upon to pay and did pay the same, and that the defendant paid one-half thereof, amounting to \$1,253.19, and that by reason thereof he is entitled to have said amount applied as an equitable set-off against the plaintiff's claim. The fifth plea, for defense on equitable grounds, states the two claims set out in the third and fourth pleas, and says that by reason thereof there is no liability on his part to the plaintiff.

The claim referred to in the third plea is a promissory note acquired by the defendant after the execution of the deed of trust, and the one set out in the third plea is on a promissory note on which he was liable as accommodation indorser before the execution of the deed of trust, but which came

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due after the date of the deed of trust, and was paid in part by him after the institution of the suit.

The first question, then, presented by the third plea is, can a debtor of an assignor for the benefit of creditors acquire, after the execution of the assignment, claims against the assignor, to be applied by him as a set-off to his debt due the trust estate? If this can be done, then a debtor by the purchase, for a very small consideration, depending upon the extent of the insolvency of the trust estate, of claims against the assignor, can acquire a preference in the distribution of the trust estate, to the full extent of his debt, thus taking from the creditors what they are entitled to, and preventing a *pro-rata* distribution among them. Such a result would be unjust and inequitable, and cannot be tolerated in either law or equity. *Burrill on Assignments* (5th Ed.), sec. 403; *Waterman on Set-Off* (2nd Ed.), sections 106, 123; *Am. & Eng. Ency. of P. & P.*, Vol. 2, p. 723-724; *Colton v. Drivers' Bldg. Assn.*, 90 Md. 85.

The proposition presented by the fourth plea is not so free of difficulty. The precise question here is, can a defendant who, at the time of the execution of a deed of trust for the benefit of creditors, was liable as an accommodation indorser of a promissory note of the assignor, not yet due, which he is called upon to pay in part after the assignment, and after suit brought by the assignee on a claim of the assignee due at the time of the assignment, set off the amount he so paid against the claim of the plaintiff?

The rule as stated by *Burrill on Assignments*, sec. 403 (5th Ed.), is "that an assignee for the benefit of creditors takes the property subject to all existing equities. The equities need not exist at the inception of the debt. It is sufficient if they exist prior to the assignment. A claim acquired after the assignment cannot be set off against the assignee; nor a liability, existing but not due at the time of the assignment, even if it becomes due before the suit was commenced." But in note 7, on page 642, it is said that "where the claim in favor of the estate of the assignor is not due at the time of

the assignment, but the claim against the estate is due, an equitable set-off in favor of the assignor's debtor will be allowed." Or, as stated in *Waterman on Set-Off*, sec. 131: "Where one claiming a set-off has a demand against the other presently payable, and the other party is insolvent, the former may claim to have the set-off made, though the demand of his adversary against him has not become payable." So in the case of *Colton v. Drivers' Bldg. Assn.*, *supra*, where the association had, at the time of the appointment of receivers for the South Baltimore Bank, a deposit with the bank of \$357.23, while the bank held its promissory note, not then due, for one thousand dollars, the Court, after a careful examination of the decisions in other States, held, in accordance with the great weight of authority, that the association was entitled to set off the amount of its deposits against the note of the bank. The reason assigned for this rule is that the right of the creditor of the insolvent to the set-off exists at the time of the assignment, and that the assignee of the insolvent takes the note in favor of his assignor, not yet due, subject to this right.

Where, on the other hand, the claim against the insolvent or assignor is not due at the time of the assignment, and the claim in favor of the insolvent or assignor is due, the right to a set-off does not exist at the time of the assignment, and the assignee takes the debt in favor of the assignor in trust for the benefit of the creditors, against whom a set-off cannot be subsequently acquired. In other words, in order that there may be a set-off in favor of the creditor of the assignor, it must exist at the time of the assignment by virtue of a claim then due.

In an extensive note to *Fera v. Wickham*, 17 L. R. A. 456, the author says: "While the decisions are not uniform in reference to either class, there is a decided weight of authority on one side in each case, and that weight is in favor of the set-off where the immature debt is owing to the insolvent and against it where it is owing by him." In the case of *Skiles v. Houston*, 110 Pa. 254, 2 Atl. Rep. 30, where, when plaintiff's in-

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testate died, his debt to the defendant was due, and his claim against the defendant was not yet due, the Court held that the defendant was entitled to set off his claim, and said: "Had the position of these parties been reversed so that Henderson's (intestate's) debt to Houston (defendant) was not due and payable at Henderson's death, but Houston's debt to Henderson was then due and payable, the application of the same principle would have prevented Houston from setting off his debt against Henderson in an action by Henderson's administrator, because, at Henderson's death, there was no right of set-off, and the right of action passed to the administrator unaffected by the right of set-off." In the case of *In Re Hatch*, 155 N. Y. 401, 50 N. E. Rep. 49, the Court of Appeals of New York reviews at length the previous decisions in that State dealing with the right of set-off where the claims of the assignors or insolvents, or the claims of creditors of such insolvents, are not due, and holds that a creditor of the insolvent, whose claim is due at the time of the execution of an assignment for the benefit of creditors, is entitled to set off his claim against a debt from himself to the insolvent which had not matured at the time of the assignment; but where the claim of the creditor of an insolvent was not due at the time of the assignment, it cannot be set off against the claim in favor of the insolvent, due at the time of the assignment. Both of these cases are cited and relied on by this Court in *Colton v. Drovers' Bldg. Assn.*, *supra*. See also 25 *Am. & Eng. Ency. of Law* (2nd Ed.), 545-6, and cases cited in notes.

Most of the cases holding a contrary view are the decisions to the effect that a bank has a right to apply to the payment of a debt not yet due, held by it against an insolvent, money on deposit in the bank belonging to the insolvent at the time of his assignment for the benefit of creditors. The banks are held to have a lien upon deposits in their hands, to secure debts due them by their depositors, and may, as against an attaching creditor, or the assignee of an insolvent owner of such deposits, apply such deposits to the payment of any claim they may have against such depositors, though its claim

may not be due at the time of such attachment or assignment. 2 *Am. & Eng. Ency. of Law* (1st Ed.), 97; *Miller v. Farmers' and Mechanics' Bank*, 30 Md. 392; *Farmers' and Merch. Bank v. Franklin Bank*, 31 Md. 404, and *Colton v. Drovers' Bldg. Assn.*, *supra*. In some States, however, where the banks are held not to have any such lien upon the moneys of a depositor, they are denied the right in a suit by the assignee of an insolvent depositor to set off against the claim of the assignee the amount of any unmatured claim held by the bank against the depositor. *Chitman v. Ninth National Bank*, 120 Pa. St. 86, 13 Atl. Rep. 707.

In this case, at the time of the assignment, the claim of the defendant against the agency did not exist, and therefore the assignee took the claim against the defendant in favor of his assignor, free of any right to a set-off in favor of the defendant, whose claim against the assignor did not come into existence until after the assignment, and until he was required to pay assignor's note by virtue of his liability thereon as indorser. *Fidelity & Deposit Co. v. Haines*, 78 Md. 454.

But for the assignment, he could, of course, upon payment of the note on which he was liable as indorser any time before the trial of the case, have set off the amount so paid by him against his debt due to the agency. *Clarke v. Magruder*, 2 H. & J. 77; *Colton v. Drovers' Bldg. Assn.*, *supra*. Before he paid the note, and thereby acquired a claim against the agency, however, the agency assigned its claim against him to the plaintiff, who took it for the benefit of the creditors of the agency, subject to only such equities as *then* existed.

Regardless of any question as to the sufficiency of the allegation of insolvency of the agency, to entitle the defendant to an equitable set-off on that ground, and without considering whether the facts set out in the fourth plea (assuming that they entitled the defendant to set off his claim), should have been pleaded as a defense on equitable grounds, we must hold, on the authorities cited, that the demurrer to the third, fourth and fifth pleas was properly sustained.

The evidence excepted to in the first exception was a state-

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ment made by the defendant from the books of the agency, including his account with the agency. Without having laid any foundation for the admission of the books themselves, a statement made from the books, though shown to be correct according to them, was not admissible. *Clarke v. Magruder, supra*; *Hoogewerff v. Flack*, 101 Md. 371. But when taken in connection with the evidence in the second bill of exception, to the effect that the defendant stated to plaintiff that the statement was correct except as to two items contained therein, which the plaintiff had deducted from the claim against him, the statement was admissible as an admission of the defendant, *Gittings v. Winters*, 101 Md. 194, and the defendant was not injured by the ruling in the first exception, while the evidence, excepted to in the second exception, to show when the statement was made, was properly admitted.

Plaintiff's first prayer is as follows: "If the Court, sitting as a jury, shall find from the evidence that the defendant is indebted to the plaintiff's assignor in any sum of money, then the Court, sitting as a jury, shall assess the damages in such a sum of money as the Court, sitting as a jury, shall find from the evidence the defendant is actually indebted to the plaintiff's assignor, together with interest at the rate of six per cent. per annum, from February 27th, 1908, interest to be in the discretion of the jury."

And defendant's prayer is as follows: "The Court instructs itself, sitting as a jury, that if it finds from the evidence that the defendant was employed in or about February, 1895, by the Maryland State Grange Agency of Baltimore City to do special work on certain books and accounts, as testified to, and it was agreed at the time that he should be paid for such work a reasonable and fair compensation, in addition to his regular salary, if the Court so finds, and the defendant performed all the work that it was agreed he should do, and it was further agreed that the amount of the compensation therefor should be submitted to the board of directors of the said Maryland State Grange Agency of Baltimore City, to be adjusted and agreed upon between the said agency and the

said defendant; and if the Court further finds that the matter was referred to the said board of directors, but that up to the 27th day of February, 1908, it had failed to consider and adjust the same, but has never disputed or denied its liability therefor, and that upon said date it made a deed of trust for the benefit of creditors to the plaintiff; then the Court instructs itself, sitting as a jury, that the defendant is entitled to a credit of such a sum of money as it may find a fair and reasonable compensation for the work done and performed by him, to be entered as a credit in the account current between him and the said agency." This prayer was granted by the Court after modifying it by adding thereto: "unless the Court, sitting as a jury, shall further find that the defendant before the institution of this suit waived or abandoned all claims for such compensation." The defendant specially excepted to this modification, on the ground that there was no evidence in the case that the defendant had ever waived or abandoned its claim for compensation for the extra work done by him, but the Court overruled the exception.

By plaintiff's prayer, the Court, sitting as a jury, was authorized to find that the defendant was indebted to the plaintiff, without being told what facts were necessary to be found in order to ascertain whether such indebtedness existed, and the prayer not only failed to instruct the Court, sitting as a jury, in regard to the law; but submitted to the Court, sitting as a jury, questions of law as well as questions of fact. Moreover, the evidence shows that the account against the plaintiff was made up of a number of charges against him and a number of credits in his favor, and the prayer, without any reference to the credits to which defendant was entitled, submitted to the Court, sitting as a jury, to find the amount to which the defendant was indebted to the plaintiff, with the instruction to assess the damages in such sum of money as it found from the evidence the defendant was so indebted. The Court, sitting as a jury, should have been instructed as to the law applicable to the facts of the case, leaving it to the Court, sitting as a jury, to find the facts necessary to entitle the plain-

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tiff to recover, which this prayer fails to do. *Thomas, Prayers and Instructions*, sec. 31; *B. & O. R. R. Co. v. Resley*, 7 Md. 297; *Roth v. Shupp*, 94 Md. 55; *Hobbs v. Batory*, 86 Md. 68.

There is no evidence in the record from which the Court, sitting as a jury, could have found that the defendant waived or abandoned his claim to compensation for the extra services rendered by him to the agency. The only evidence in the case bearing upon the question was the testimony of the defendant, that he rendered the extra services with the understanding with the agency that he would be paid for them, and that he had repeatedly demanded payment, but that, without any denial of his right to compensation, the agency had, from time to time, postponed the adjustment of the matter. The mere fact that he had not collected his claim for such services up to the time of the assignment, would not justify a finding that he had waived or abandoned the claim. 29 *Am. & Eng. Ency. of Law* (2nd Ed.), 1097, 1105.

While a set-off must be specially pleaded, and evidence in support of it is not admissible unless it is so pleaded (1 *Poe, P. & P.* (3rd Ed.), sec. 613; *Burch v. State*, 4 G. & J. 444; *Sangston v. Maitland*, 11 G. & J. 297; 19 *Ency. P. & P.* 738-742), when such evidence is produced without objection, and the right to recover is not confined by the prayers to the pleadings and evidence, the jury, or the Court, sitting as a jury, may find the set-off in favor of the defendant. And in considering a prayer granted which does not refer to the pleadings, and which is not affected by any other prayer referring to the pleadings, this Court cannot consider the pleadings, but must determine the correctness of the prayer with reference to the evidence. *South Balto. Co. v. Muhlbach*, 69 Md. 395; *Home Friendly Society v. Roberson*, 100 Md. 88.

As the evidence in this case did not justify the addition to defendant's prayers, made by the Court, there was error in granting the prayer as modified, and in overruling defendant's special exception to such modification, and for such er-

ror, and the error in granting plaintiff's prayer, the judgment will be reversed, and the case remanded for a new trial.

Judgment reversed with costs, and case remanded for a new trial.

PETER McMAHON vs. FREDERICK J. CREAM ET AL.

Tax Sales—Title of Purchaser Prima Facie Valid—Preliminary Notice of Sale—Place of Making Sale Under Former Statute—Act Validating Deeds by Tax Collectors for Property Sold by Their Predecessors.

The purchaser at a tax sale, which was made in compliance with the statute, has a new and complete title to the land and all prior encumbrances and titles of private persons are extinguished by the sale.

Since the enactment of Code, Art. 81, sec. 53 (Act of 1872, ch. 384), it is not necessary for the purchaser at a tax sale to show affirmatively that all the proceedings under which the sale was made were regular. Under that statute, when the Court ratifies and confirms a tax sale reported to it by the Collector of Taxes, the purchaser acquires a good *prima facie* title, and the burden of proof to show that the proceedings were irregular is thrown upon the person attacking the sale.

The local law of Baltimore (City Code, 1879), Art. 47, sec. 44, provided that no sale should be made by the Collector for non-payment of taxes until he has first given notice to the person in arrear, or left at his residence, a statement of the indebtedness and not less than thirty days' notice of his intention, if the bill be not paid, to enforce payment thereof. In this case the Collector's report of the tax sale stated that he had given notice to the delinquent owner that if the bill rendered be not paid within thirty days it would be *subject to*

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distrain or *execution*. But the tax bills filed as exhibits with the report of sale showed that they contained a notice in red ink to the effect that if not paid within the time limited, payment thereof *will be enforced by distrain or execution*, and these were copies of the bills as rendered. *Held*, that this preliminary notice of the sale actually given was in compliance with the statute.

In 1879, when the tax sale in this case was made, the general law (Code of 1860, Art. 81, sec. 50; Rev. Code of 1878, Art. 11, sec. 49) provided that tax sales should be made on the premises or at the Courthouse door. The Act of 1878, ch. 227, relating to such sales in Baltimore City, contained no direction as to the place where the sale should be made. *Held*, that the general law, being in conflict with the local, did not control in this respect in said city; that under the local law the place of the sale was left to the discretion of the City Collector, and that a sale made by him at the Exchange Sales Rooms, where it was customary to make such sales, after due notice by advertisement, was valid.

A collector of taxes executed a deed to the purchaser for the property sold for taxes by his predecessor in office, whereas such deed should have been executed by the collector who made the sale. Afterwards the Act of 1904, ch. 281, provided that whenever any property in Baltimore City has been sold for taxes by one City Collector, but the deed therefor executed by his successor in office, such conveyance shall be as valid as it would have been if made by the collector who made and reported the sale. *Held*, that this Act is a proper exercise of the legislative power and does not violate any right of the owner of the property so sold.

Decided, per curiam, December 9th, 1908. The following opinion was filed January 13th, 1909.

Appeal from the Court of Common Pleas (STOCKBRIDGE, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

Thomas G. Hayes (with whom was *Henry J. Broening* on the brief), for the appellant.

This is an action of ejectment brought by the appellees, as plaintiffs, against the appellant, as defendant. The property involved is leasehold property Nos. 40 and 42 Marsh Market Space, in Baltimore City. The title of the appellees is that of remaindermen under the will of Edward Burns. The appellant's title is a tax title derived as follows: The property in fee was sold by Baltimore City through City Collector Webb on October 15th, 1879, for taxes in arrears; the City was the purchaser at that sale. Afterwards the tax deed was made to the City by City Collector Taylor, and on March 19th, 1884, the City sold the said property at public sale to the appellant for \$1,300, and on said date conveyed the property by a fee simple deed to the appellant, and on the date of said deed the appellant went into possession of the property and has had possession ever since. The appellees as remaindermen from the accrual of their title, being out of possession for only about sixteen years, are not barred by limitation, and they attack the appellant's tax title upon the ground that the said tax title is in several respects irregular, void and invalid. The three special grounds assigned for the invalidity of the appellant's tax title are:

1. The *place* of tax sale, to wit, the Real Estate Exchange Sales Rooms, was not the place assigned for such tax sales under the law of the State.

2. That the notice to the delinquent tax debtor given in this case printed in red ink across the face of the tax bills was not as prescribed by law.

3. That the curative Acts of 1904, chapters 281 and 386, which were intended to remedy the defect of the tax deed for said property by City Collector Taylor to the Mayor and City Council of Baltimore, and not by City Collector Webb, who made the tax sale, was void because these Acts destroyed a vested right of the appellees. The lower Court ruled, that for the first two reasons given the tax proceedings were invalid, and gave the appellant no title whatsoever to the prop-

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erty in question, and the lower Court refused to pass on the third objection.

From the judgment of the lower Court, giving in this ejectment action, for the reason stated, the leasehold property to the appellees, the appellant appealed and contends that the learned lower Court committed error in ruling that the *place* and *notice* of said tax sale were contrary to law. Considering now these three objections to the tax sale in question in their order, we have:

I. *Place*: The lower Court held that the *place* at which the tax sale should have been held was "*either on the premises or at the Courthouse door,*" as prescribed by Code of Public General Law of 1860, Article 81, section 50, which provision was also in the Code of 1878, Article 11, section 49, and that as said tax sale was at the Real Estate Exchange Rooms, and not on the premises or at the Courthouse door, the tax sale was null and void. The answer of the appellant to this ruling is that the learned lower Court fell into a patent error in holding that this Public General Law applied or prescribed the mode of procedure or place where such tax sale should be had. The matter of land or ground tax sales for taxes in arrears in Baltimore City was prescribed by a local law for Baltimore City, and that local law governing this tax sale was the Act of 1878, chapter 227; and that this latter Act wisely left the place of land tax sales in the city to the discretion of the City Collector, and that his selection of the Exchange Sales Room, which was fully named and described in the advertisement of sale, was in perfect conformity with this Act of 1878.

II. *Notice*: The learned lower Court held that the requirement of the notice to delinquent taxpayers was prescribed by Ordinance of Baltimore City No. 46, of June 2, 1862 (Baltimore City Code of 1879, Article 47, section 44), and that it had not been complied with by the City Collector, and this defect made the tax sale null and void. The appellant denies that this ordinance had anything whatever to do with the terms of this notice, because a General Public Law, Act 1874,

chapter 483, section 48, prescribed what this notice should contain, and that the notices printed across the face of two of the tax bills was an exact compliance with what this Court in *Textor v. Shipley*, 86 Md 441, 442, said was what this general law requires the notice to contain; and that the notice on the third tax bill, while changed in a minor respect in language, was a substantial compliance with what this Court had said in *Textor v. Shipley*, *supra*, was sufficient. The printed notices across the face of the tax bills which had been approved in *Textor v. Shipley*, *supra*, was as follows: "Notice—If this bill is not paid within thirty days from delivery, payment will be enforced by distraint or execution." And the notice printed on the third tax bill, and which the appellees claimed did not comply with the law, was as follows: "Notice—If this bill is not paid within thirty days from delivery, *it will be subject* to distraint or execution." The legal effect and force of this last-above notice is exactly the same as the first two. Their substance is in every respect legally the same. There is not the slightest force in the contention of the appellees that the above-last notice was not in conformity with the law prescribing the notice. The objection is hypercritical.

III. *Curative Acts*: The curative Acts of 1904 were passed by the Legislature to meet the opinion of this Court as given in the case of *Taylor v. Forest*, 96 Md. 529, by which opinion this Court decided that the report of the tax sale as well as the tax deed to the purchaser must be made by the City Collector who made the tax sale, and not by his successor in office. As it was found that in most of the tax sales made in Baltimore City neither the report of past tax sales nor the tax deed to the purchaser had been made by the City Collector who made the tax sale, but by his successor in office, to remedy this irregularity or defect in the title of a large majority of past tax titles, these Curative Acts of 1904, chapters 281 and 386, were passed. The title of the Act of 1904, chapter 286, conclusively shows that its purpose and object was both retrospective and prospective. This title was as follows: "An Act

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to make *all* tax sales in the City of Baltimore made by one City Collector and reported, and the property conveyed by his successor in office, or made and reported by one City Collector and property conveyed to (by) his successor in office."

The tax sale involved in this case was made by City Collector Webb, and the tax deed for property sold at tax sale was made to the Mayor and City Council of Baltimore by City Collector Taylor, Mr. Webb's successor in office; hence, it was necessary to invoke the curative effect of this Act in order to validate the tax title which gave title to the appellant. The appellees insist that this cannot be done, because they claim to permit this Act to have this curative effect on the tax title in question would deprive these appellees of a vested right. The vested right so destroyed as claimed by the appellees is solely and simply permitting the successor in office of the City Collector who made the tax sale to make the tax deed. To claim that the curing of a simple irregularity in the procedure of a public official in making a tax sale, by the Legislature which regulated originally the whole tax procedure, is the destruction of a vested right, does seem calculated to raise a smile on the face of one who hears the statement. If the Legislature had the original power, as it undoubtedly had, as shown by the case of *Taylor v. Forest, supra*, to prescribe which City Collector should report the tax sale and make the tax deed, the Legislature unquestionably had also the power to remedy any defect or irregularity of such City Collector by a curative act. It is difficult to conceive how the remedying of such irregularity or omission can be the destruction of a vested right. All the authorities universally hold that the Legislature has the power to remedy or cure such an omission or neglect of duty of a public official. Some of the many authorities which support the above statement are the following: 6 A. & E. Encyl. Law, 940; 26 A. & E. Encyl. Law, 998, 999; *Thomas v. Lee County*, 3 Wall. 331; *Randall v. Keiger*, 23 Wall. 14; *Mattingly v. District of Columbia*, 97 U. S. 690; *Steel Co. v. Erskine*, 39 C. C. A. 173, note. And the following Maryland cases conclusively establish that the Curative

Acts of 1904 destroyed no vested rights of the appellees in the property in question: *Grove v. Todd*, 41 Md. 641; *Williar v. Butchers' Assoc.*, 45 Md. 560; *O'Brian v. Balto. County*, 51 Md. 24; *Madigan v. Building Assoc.*, 73 Md. 321; *Wilson v. Simon*, 91 Md. 7; *Miners' Bank v. Snyder*, 100 Md. 57.

6 A. & E. *Encyl. Law, supra*, thus states the rule of law as to curative acts: "The general rule has often been declared that the Legislature may validate retrospectively any proceedings which they might have authorized in advance; and it is immaterial that such legislation may operate to divest an individual of a right of action existing in his favor, or subject him to a liability which does not exist originally."

26 A. & E. *Encyl. Law, supra*, thus states the same rule of law as to all curative acts being retroactive and that legislatures could validate any act it might have originally authorized: "Although necessarily retroactive, curative acts are not for that reason invalid, for the general rule is that the Legislature can validate any act which it might have originally authorized. Curative acts apply to pending suits unless they are expressly excepted." In *Thompson v. Lee County, supra*, it is said: "If the Legislature possessed the power to authorize the act to be done, it could by a retrospective act cure the evils which existed, because the power thus conferred had been irregularly executed. The question with the Legislature was one of policy, and the determination made by it was conclusive."

The above quotation was made a part of the opinion of this Court in *O'Brian v. Baltimore County, supra*. In *Williar v. Butchers' Association, supra*, this Court has thus defined a vested right: "A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. When it springs from contract or from the principles of the common law, it is not competent for the Legislature to take it away." What City Collector shall report a tax sale or make a tax deed proceeds neither from contract nor the principles of the common law, as stated in the case of *Taylor v. Forest, supra*; it rests solely

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in the power of the Legislature; hence any curative acts to remedy or cure irregularities of the exercise of this power originally conferred and prescribed by the Legislature cannot be said to destroy vested rights.

IV. *Tax Sale Destroyed All Existing Claims and Liens on Said Property*: Since about 1874 the law then passed made all tax sales reported to the Circuit Court of Baltimore City and ratified by that Court *prima facie* good and valid, and put upon the party objecting to the tax sale the burden to show a failure to comply with the law in making said sale, and no presumption can be invoked against the regularity or validity of the sale. *Cooper v. Holmes*, 71 Md. 26; *Guisebert v. Etchinson*, 51 Md. 478; *Ex Parte Tax Sale*, 172, 42 Md. 196; *Margraff v. Cunningham*, 57 Md. 585; *Richardson v. Simpson*, 82 Md. 159; *Stuart v. Meyer*, 54 Md. 454.

Nothing whatever has been shown by the appellees to overcome this *prima facie* case of regularity and validity of the tax sale in question, and hence the appellant under said tax sale has a good and valid fee simple title to the property in question.

What, now, is the legal force and effect of the appellant's tax title on the leasehold estate of the appellees? It is to wipe the title of appellees as remaindermen out of existence. "If the tax deed is valid, then from the time of delivery it clothes the purchaser, not merely with the title of the person who had been assessed for the taxes and had neglected to pay them, but with a new and complete title to the land, under an independent grant *from the sovereign authority*, which bars or extinguishes all prior title and incumbrances of private persons and all equities arising out of them." *Hefner v. Ins. Co.*, 123 U. S. 751. The above exact quotation has been made a part of two opinions of this Court, namely, in *Textor v. Shipley*, 86 Md. 438, and *Hill v. Williams*, 104 Md. 604.

S. S. Field and *Frank Driscoll* (with whom was *John E. Dempster* and *Gill & Preston* on the brief), for the appellees.

This was an action of ejectment. Plaintiffs' evidence has

already been passed on by this Court and has been held to show *prima facie* a title in plaintiffs. *Cream v. McMahon*, 106 Md. 507.

That was plaintiffs' appeal. The case was remanded for new trial and a verdict and judgment were rendered for plaintiffs for two-thirds undivided interest and damages for mesne profits, \$1,005.58. There are a number of exceptions to evidence, but the principal point is involved in the Court's actions on the prayers and motion at the end of the case, and is whether the tax sale title relied on by defendant is void or valid. Another question was whether the plaintiffs were entitled to two-thirds or five-sixths; a third involved the rule for calculating mesne profits; and still another question arose as to the form of the verdict.

In ratifying tax sales, Court acts under *special jurisdiction*, and unless the *recitals of the record show* a substantial compliance with all preliminary requisites of the law, the tax sale and title thereunder will be void. *Guisebert v. Etchison*, 51 Md. 487; *Taylor v. Forrest*, 96 Md. 534; *Richardson v. Simpson*, 82 Md. 155.

In the tax proceedings set up by defendant in this case, the following defects appear, mentioning them in the order of time without regard to the order of importance:

(1) The preliminary notice was insufficient. It was: "If this bill is not paid within thirty days from delivery *it* will be subject to distraint or execution."

Literally this means nothing, but reading it to mean that *the property* will be subject to distraint or execution, it simply tells what the *law will authorize the collector* to do. But the law requires the collector to notify the taxpayer what *he intends to do*, not what the law would authorize him to do, and he might or might not do. Everyone is presumed to know the law, but cannot know the collector's intention, until he tells them, and therefore the law requires the collector to put on the tax bill notice of what he intends to do. "A notice annexed thereto that unless the taxes so due are paid within thirty days thereafter *he will proceed* to collect the same by

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way of distress or execution to be levied on said real or personal property." *Rev. Code*, 1878, Art. 11, sec. 48. Compare *City Code*, 1879, Art. 49, sec. 44, page 1084.

This is a fatal defect. *Guisebert v. Etchison*, 51 Md. 487 (see 3rd prayer on page 481, approved on page 488); *Benzinger v. Gies*, 87 Md. 707-8.

Two of the tax bills appearing in the record have the right notice on them, but the third has a defective notice, like that in the report. It looks as though they used the right notice in 1876 and 1877, and began to use the insufficient one in 1878, and therefore naturally used the insufficient one in 1879, when the notice was served on Mr. Crean. At all events, the only evidence of what notice was on the tax bills delivered to Mrs. Crean is the statement in the report: "That upon each of such bills so delivered was printed a notice, as follows: 'If this bill is not paid within thirty days from delivery, it will be subject to distraint or execution.'"

The report does not say that the bills *filed with the report* are copies of the bills *delivered to Mrs. Crean*, but merely that the bills filed contain copies of the entries on the assessment books.

Accordingly, on these bills in the record you find no commissions, interest, penalty, or footing; all of which were, of course, on the bills delivered Mrs. Crean.

(2) The notice of sale was insufficient, if the general law on that subject governs, because that requires the notice to be set up at the Courthouse door, which was not done. *Rev. Code*, 1878, Art. 11, sec. 49; *Baumgartner v. Fowler*, 82 Md. 632, 640.

But if the Court considers the local law exclusive, then the notice was sufficient. *City Code*, 1879, Art. 49, sec. 5.

(3) Sale void because made at Real Estate Exchange, whereas law requires it to be made at Courthouse door or on premises. *Revised Code*, Art. 11, sec. 49; *Code*, 1860, Art. 81, sec. 49.

The general law governs the place of sale because there was no provision of the local law on that point. *City Code*,

1879, Art. 49, sec. 5; *Cooper v. Holmes*, 71 Md. 26; *App. Tax Ct. v. W. M. R. R.*, 50 Md. 296.

(4) No title passed because *whole* purchase money not paid. *Rev. Code*, 1878, Art. 11, sec. 51; *City Code*, 1879, Art. 49, sec. 48, and sec. 7, and sec. 10. Report of collector shows property sold for \$1,025.00, and only \$326.25 paid.

(5) Title defective because deed not made by collector who made sale, as required by *City Code*, 1879, Art. 49, sec. 7, sec. 48.

The purchaser has no *legal* title until he gets the Collector's deed. *Young v. Ward*, 88 Md. 421; *City Code* (1879), Art. 49, sec. 49, page 1086.

And the Collector who made the sale must make the deed (as the law then was); a deed by a subsequent Collector conveyed no title available to the purchaser in ejectment. *Taylor v. Forrest*. 96 Md. 533.

The Court below held the title set up by defendants void because of the first and third defects above mentioned. That these were fatal defects is demonstrated by the clear and logical opinion of the Court below, which gives full references to the law then governing tax sales.

That the fifth defect, that the deed was not made by the Collector who made the sale is fatal, has been decided by this Court in *Taylor v. Forrest*, above quoted. But the defendant relied on the Act of 1904, chapter 281, to cure this defect. We submitted to the Court below by our fourth and fifth prayers that it was not within the power of the Legislature to validate a prior tax proceeding which was void, and by legislative fiat give defendant a title when before the Act he had none.

The situation seems to us clear. On the day before this Act of 1904 was passed plaintiffs had a title on which they could recover in ejectment and McMahon had no title, as expressly decided by this Court in *Taylor v. Forrest*. Now, if after the Act McMahon has a title by which he can defeat plaintiffs' ejectment, then the Act of the Legislature has divested plaintiffs of their title—their vested rights in land—and has vested

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a title in defendants. This the Legislature could not do. *Johnson v. Taylor*, 10 L. R. A. (New Series), 818; *Wilderman v. Balto.*, 8 Md. 551; *Rock Hill College v. Jones*, 47 Md. 1, 17; *Remington v. Met. Bank*, 76 Md. 546; *Williar v. Butchers' Assn.*, 45 Md. 546; *Blackwell on Tax Titles*, 953; *Foster v. Foster*, 129 Mass. 559, 561; *Hodgson v. Burleigh*, 4 Fed. Rep. 127; *Dingey v. Paxton*, 60 Miss. 1057; *Roche v. Waters*, 72 Md. 264; *Garrison v. Hill*, 81 Md. 556.

BURKE, J., delivered the opinion of the Court.

This is a suit in ejectment instituted in the Court of Common Pleas by four of the children of Charles and Catherine Crean, deceased. The plaintiffs claim title to the lot sued for under the will of Edward Burns, who died seized thereof in 1862. The lot was a leasehold, subject to an annual ground rent of two hundred and forty dollars. The title to this leasehold was acquired by Edward Burns under an assignment from Benjamin V. Richardson. The property is located on the west side of Market Space in Baltimore City, and at the time of the death of Edward Burns was improved by two brick houses, known as Numbers 40 and 42 Marsh Market Space. Burns bequeathed the property to Charles and Catherine Crean during their lives, and immediately after the death of the survivor "unto the living issue of the aforesaid Charles and Catherine Crean, share and share alike, absolutely." Charles Crean died in 1884, and Catherine, the surviving life tenant, in 1889.

The State and City taxes on this property for the years 1876, 1877 and 1878 being in arrears and unpaid, it was sold on October 15th, 1879, for non-payment of these taxes by Charles Webb, the Collector of City and State Taxes. The sale was made at the Exchange Building, on Second Street, in the City of Baltimore, and was sold to the Mayor and City Council of Baltimore in fee, \$1,025.00. The sale was reported by Mr. Webb, the Collector, to the Circuit Court for Baltimore City, and was by that Court finally ratified and confirmed on the 22nd day of September, 1882. The prop-

erty was conveyed to the Mayor and City Council of Baltimore by Henry S. Taylor, Collector, by deed dated December 7, 1883, and on March 19, 1884, by deed of that date, the City, in consideration of the sum of thirteen hundred dollars, granted and conveyed the property to the defendant in this suit, who paid the full purchase price and took possession of the property on the date of the deed, and has been in continuous possession to the present time. At the date of the purchase by the defendant the property was in bad condition and was not tenantable, and in order to put it in condition to be rented Mr. McMahon was obliged to spend from sixteen to eighteen hundred dollars for necessary repairs. The improvements placed by him upon the property were destroyed by the great fire of 1904, and the property was rebuilt by the defendant at a cost of about five thousand dollars.

The case was tried below before the Court without the intervention of a jury and resulted in a verdict and judgment in favor of the plaintiffs and the defendant has brought this appeal. In a *per curiam* opinion filed December 9th, 1908, we said: "It is admitted that the suit must fail if the appellant acquired a good title under the tax sale and the deed mentioned. The Court below held that the defendant took no title under the tax sale—first, because the preliminary notice given was insufficient, and, secondly, because the place of sale was not that authorized by law. The property was sold at the Exchange Sales Room, but, in the opinion of the Court below, the property could only be sold either on the premises or at the Courthouse door of the City. Some additional reasons have been urged against the defendant's title. It is insisted he took no title under the deed because the deed was not made by the Collector who made the sale. We hold that the proceedings under which the tax sale was made show a sufficient compliance with all the prerequisites of the law relating to tax sales in Baltimore City, and that the defect urged against the deed upon which the defendant relies has been cured by subsequent legislation. We decide that the defendant has shown a good title to the land sued for, and that the

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judgment must be reversed without awarding a new trial." That judgment was accordingly entered.

Assuming for the moment the validity of the proceedings under which the tax sale was made, and that the deeds of December 7th, 1883, and March 19, 1884, operated to pass the legal title to the property first to the Mayor and City Council and then to the defendant, it cannot be questioned that the last-named deed afforded the defendant a complete bar to recovery in this suit. We said in *Textor v. Shipley*, 86 Md. 438, that "the title of the defendant is founded upon and derived from the tax sale (*Burroughs on Taxation*, 346; *Hussman v. Durham*, 165 U. S. 147; *Hefner v. North Western Ins. Co.*, 123 U. S. 751), for although he did not purchase at the tax sale, his grantor, the City, did. In *Hefner v. The Insurance Company*, *supra*, it is said: "If the tax deed is valid, then from the time of its delivery it clothes the purchaser, not merely with the title of the person who had been assessed for the taxes and had neglected to pay them, but with a new and complete title in the land, under an independent grant from the sovereign authority, which bars and extinguishes all prior titles and incumbrances of private persons, and all equities arising out of them." *Hill v. Williams*, 104 Md. 604; *Hill v. McConnell*, 106 Md. 574.

Before the passage of the *Act of 1872, chapter 384* (Code, 1904, Art. 81, sec. 53), which required the Collector to report the sale, together with all the proceedings had in relation thereto to the Court for confirmation, a sale made by a Collector of Taxes could only be supported upon it being made to appear *affirmatively* that all the provisions of the statute, authorizing the sale, had been strictly complied with. The power of sale vested in a Collector of Taxes is a naked power, specially conferred by statute, to be exercised under a proceeding *ex parte* in its character, and the effect of which is to divest a citizen of his property without his consent, and often without his actual knowledge. It was therefore established, as an indubitable principle, that a purchaser, who claimed under a power of this nature, should show affirma-

tively and positively the regularity of the proceedings upon which his title depended. *Alexander v. Walter*, 8 Gill, 239-260; *Williams v. Payton*, 4 Wheat. 77; *Thatcher v. Powell*, 6 Wheat. 119.

But to relieve the purchaser of this *onus* and to give encouragement to purchasers at tax sales, the statute now in force (Act of 1874, chapter 483, section 51) provides that the Collector shall report the sale and the proceedings in relation thereto to the Courts mentioned in the Act; and the Court, to which such report shall be made, shall examine the said proceedings, and if the same *appear to be regular*, and the provisions of law in relation thereto have been *complied with*, shall order notice to be given by advertisement, etc., to show cause, if any they have, why said sale shall not be ratified and confirmed; and if no sufficient cause be shown against the ratification, "the said sale shall, by order of said Court, be ratified and confirmed, and the purchaser shall, on payment of the purchase money, have a good title to the property sold." This statute confers upon the Courts designated a special and limited jurisdiction, which attaches upon the report of the Collector; and though the sale may be confirmed by the Court, the order of confirmation operates only to relieve the purchaser of the *onus* of proof, and to cast the *onus* of showing the illegality of the proceedings upon the party resisting the sale. The effect, therefore, of the order of ratification is only *prima facie* in support of the sale, not conclusive; the sale, under the order of confirmation, affording evidence of a good title, until successfully assailed by evidence showing illegality in the proceedings upon which it is founded. *Guisebert v. Etchison*, 51 Md. 478. Until such proof is offered by the assailing party, the sale, if ratified and confirmed, stands good and effective, by operation of statute. *Stewart v. Meyer et al.*, 54 Md. 465, 466, 467.

It is only necessary that there shall be a substantial compliance with the tax law under which the sale was made. *Guisebert's Case*, *supra*; *Textor v. Shipley*, *supra*. The Court will presume that the Collector has discharged his duty, and

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no presumption will be invoked against the validity of the proceedings. But where it appears, by the record, or by proof that material and substantial provisions of the law have not been observed in making the sale it will be treated as utterly null and void. Under the Public Local Law of Baltimore City (City Code, 1879, Art. 47, section 44), no sale could be made by the Collector for the payment of taxes until he has "first given to the person or persons so in arrears, or has left at his, her, or their residence, or last known residence, or if neither can be found on the premises, a statement of his, her or their indebtedness, and not less than thirty days' notice of his intention, if the bill is not paid within the time named, to enforce payment thereof."

In this case the property was assessed to Mrs Crean, one of the life tenants, and the bills for taxes setting forth the amount of the taxes due on the property to the State and City, and specifying the years for which they were due, were delivered to her. It is true that in the report of the Collector it is stated that on each of the bills delivered to her there was a printed notice stating that if this bill is not paid within thirty days from delivery it will be subject to distraint or execution. Such a notice would be insufficient, because it is not such as the law requires, and if nothing else appeared by the record we would be constrained to hold the sale void. But looking at the whole record of the tax proceedings, it is apparent that this statement in the report of sale is erroneous, as two of the tax bills filed as exhibits with the report of sale contain a notice, printed in red ink across the face of each bill, to the effect that if the bill is not paid within thirty days from the delivery, payment thereof will be enforced by distraint or execution. These exhibits are copies of the entries in the assessment books of the City, and, as we understand the report, they are identical with the bills delivered to the owners. If, however, there should be any doubt upon this point, it should be resolved in favor of the validity of the sale, in the absence of satisfactory proof that this notice was not given. We are of opinion that these tax bills and

the notice printed thereon show the character of the preliminary notice given by the Collector, and are sufficient to gratify the requirements of the law in this respect.

As to the place of sale. The property was sold at the Exchange Sales Room. This was held by the learned Judge below to be a defect which rendered the sale void. He held that under *Article 11, section 49 of the Code of 1878*, the only places at which tax sales in the City of Baltimore could be made were either on the premises or at the Courthouse door of the City. It has not been the custom in the city to make tax sales at either of these places, nor has it been the understanding of the City authorities that the law imposed such a requirement. Such a construction would unsettle many tax titles. This consideration, it is true, should not control the action of the Court if it appears that a plain mandate of the law has been disregarded; but the Court should not be insensible to the serious consequences which would inevitably result from such a construction.

In making this sale the Collector proceeded under the *Act of 1878, chapter 227*, which made provisions for the sale of ground in Baltimore City for non-payment of taxes. That Act provided that "whenever it shall become necessary to sell any part or parcel of ground in the City of Baltimore, improved or unimproved, for the payment of any taxes or assessment of any nature or kind whatever, levied or charged, the Collector shall first give notice by advertisement published once a week for four successive weeks in two of the daily newspapers published in said City, one of which shall be in the German language, that he will sell at public auction on the day in said advertisement mentioned; said notice shall state the name of the person, when known, to whom such parcel of ground is assessed, the amount of taxes due on the same, and what improvements, if any, are on said parcel of ground; and in any such notice it shall be sufficient to describe the parcel of ground as located upon whatever official plat of the City the said Mayor and City Council of Balti-

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more shall from time to time adopt and designate for that purpose."

This Act contained no direction as to the place of sale, but left that, we think, very properly and wisely, to the judgment and discretion of the City Collector. A comparison of the terms of this Act with the section of the Code of 1878 mentioned above will show the most irreconcilable conflict. This, in connection with the evident purpose of the legislature to provide by local law a different procedure for the sale of land in Baltimore City for the non-payment of taxes, is sufficient, upon familiar principles of statutory construction, to show that the place of sale named in the general law was not intended to control sales made under the *Act of 1878, chapter 227*. We are, therefore, of opinion that the tax sale was valid and its ratification by the Court vested in the purchaser, the Mayor and City Council of Baltimore, under the statute, a good title to the property sold.

Under the authority of the case of *Taylor v. Forrest*, 96 Md. 529, Henry S. Taylor, Collector, had no power to execute a deed to the Mayor and City Council for the property sold by his predecessor, Mr. Webb; but this defect has been cured by *section 2 of the Act of 1904, chapter 281*. This section provided that whenever any property in the City of Baltimore has been sold for taxes, pursuant to law, by one City Collector, and such sale has been reported by the City Collector who made the sale, but the deed for such property has been executed and delivered by the successor in office of the City Collector who made the sale and report as aforesaid, such conveyance shall be as valid to all intent and purposes as it would have been if made by the City Collector who made and reported the sale.

It would have been a perfectly valid exercise of power by the Legislature to have authorized the successor in office of the City Collector to make the deed, and this Act which validates the deed of such Collector cannot be said to violate any of the vested rights of the owner. His rights in the property were divested by the tax sale. Instead of designating some partic-

ular person to execute a deed to the purchaser for the property sold, the Act merely validates the deed already executed. We see no possible objection to this. For the reasons assigned we reversed the judgment, without awarding a new trial.

Judgment reversed without awarding a new trial.

THE TRUSTEES OF THE EUTAW STREET METHODIST EPISCOPAL CHURCH ET AL. vs. THE ASBURY SUNDAY-SCHOOL SOCIETY ET AL.

Religious Societies—Separation Into Different Organizations—Title to Property.

At a time when a religious society had under its charge two churches and affiliated with it two corporations, one for the relief of the poor, and the other the A. Sunday-School Society, a will was probated by which sums of money were bequeathed to these two corporations, subject to a life estate. Before the legacies became payable, the two churches were separated and made independent by competent ecclesiastical authority, and a resolution of the members directed that the property of the parent society, and legacies to be received, should be divided between the separated churches. Subsequently the said legacies were paid to the corporations named in the will, both of which were connected with one of said churches, and the bill in this case, filed by the other church and its societies, asked for a division of the legacies. *Held*, that the resolution adopted by the members of the religious society at the time of its separation is of no effect as to this property, because it was not the action of the directors of the corporations, legatees.

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Held, further, that the Society for the Relief of the Poor was not an integral part of the organization of the church and that the corporation named in the will is entitled to the whole of the legacy paid to it.

Held, further, that since the A. Sunday-School Society was an integral part of the church organization which was divided, one-half of the legacy paid to it should now be transferred to the Sunday-School Society of the other church, as the legacy was intended to be for the benefit of the Sunday-schools of both churches.

Decided January 12th, 1909.

Appeal from the Circuit Court of Baltimore City (ELLIOTT, J.)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

Joseph C. France and Richard M. Duvall, for the appellants.

Charles E. Hill and John Philip Hill, for the appellees.

WORTHINGTON, J., delivered the opinion of the Court.

By his last will and testament, dated March 12th, 1868, Thomas Armstrong, since deceased, of Baltimore City, among other bequests, gave and bequeathed as follows:

"To the Society for the Relief of the Poor of the Methodist Episcopal Church of Baltimore City Station (duly incorporated), \$1,000, to be invested and the interest applied for the use of said society."

"To the Asbury Sunday-School Society of Baltimore, \$1,000."

The precise date of Mr. Armstrong's death does not appear, but his will was duly probated on November 19th, 1868.

By the provisions of the will these legacies were not to be

paid until after the death of the testator's wife, who survived him about 13 years, dying in the year 1881. Subsequently, in the year 1882, these legacies were paid to the legatees above named, both incorporated bodies, and it is to recover one-half of both these legacies that the suit in this case was instituted by the three appellant corporations in the Circuit Court of Baltimore City.

In order to understand the nature of the appellant's claim, it will be necessary to relate the circumstances under which the Methodist Episcopal Church organization in Baltimore City existed at the time of the making and probating of Thomas Armstrong's will, and to note certain changes that took place in its organization subsequently.

At the time of the date of the will, as well as of its probate, there were two churches of this denomination in Baltimore City one the Light Street Church and the other the Eutaw Street Church, which together constituted what was known as the Baltimore City Station of the Methodist Episcopal Church.

The Baltimore City Station, as such, was not incorporated, but there was a corporation known as the "Trustees of the Methodist Episcopal Church in the City and Precincts of Baltimore," which held the legal title to the property of both these churches, consisting of the church edifices, the land upon which they stood, a cemetery and other assets.

There were also at that time two other corporations connected and affiliated with the Baltimore City Station, one of which was "The Asbury Sunday-School Society of Baltimore," and the other "The Society for the Relief of the Poor of the Methodist Episcopal Church, Baltimore City Station," the two corporations named as legatees in the will of Thomas Armstrong, as above mentioned.

The preamble to the articles of incorporation of the Sunday-School Society was to the effect that the association was formed "in connection with the Sunday-schools belonging to Baltimore City Station of the Methodist Episcopal Church," and its charter empowered the corporation to receive, hold

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and possess property, and to sell, transfer or lease the same in such manner as would be most conducive to the benevolent uses of the society.

The object of the Society for the Relief of the Poor was declared to be to afford "pecuniary aid and assistance to the indigent and poor members of the Methodist Episcopal Church attached to that part of said church in the City of Baltimore, commonly known as the 'Baltimore City Station,' and for no other purpose or purposes whatsoever."

The testator in his lifetime was a member of the Light Street Church, but attended, in the latter years of his life, most frequently the Eutaw Street Church, as he lived within a block of that church. It was also shown that he was much interested in all the work of the station.

A short time after Mr. Armstrong's death—that is to say, in March, 1869, at a session of the Baltimore Conference of the Methodist Episcopal Church, the Bishop presiding at said Conference, in the exercise of his legitimate powers and functions, separated "the ecclesiastical relationship" which had so long existed between the two charges constituting the Baltimore City Station, to wit, Light Street and Eutaw Street Churches, so that thereafter these two congregations or charges became ecclesiastically separate and independent churches.

On September 27th, 1869, a meeting of the male members over twenty-one years of age of the Baltimore City Station met in the Light Street Church, and by certain resolutions, which were adopted, directed a deed to be made by the trustees of the M. E. Church in the City and Precincts of Baltimore to the trustees of the Eutaw Street Church, as soon as they should be duly elected according to law, of their church lot and improvements on Eutaw Street, and also to pay to the trustees of the Eutaw Street Station the sum of \$14,500.

This meeting of male members also passed the two following resolutions:

"*Resolved*, That any unpaid legacies when due and paid shall be equally divided between Baltimore City Station and Eutaw Street Station."

“Resolved, That we respectfully advise the Society for the Relief of the Poor of Baltimore City Station to equally divide the funds held by them, known as the ‘poor fund.’ ”

Soon thereafter the trustees of the Eutaw Street Church became an incorporated body and the deed for its church property was made to them and the sum of \$14,500 paid them in accordance with the aforementioned resolution to that effect.

Subsequently the Eutaw Street Methodist Episcopal Sunday-School of Baltimore City and The Society for the Relief of the Poor of the Eutaw Street Station Methodist Episcopal Church of Baltimore City, two of the appellant corporations, were duly incorporated, and the former received from the Asbury Sunday-School Society of Baltimore all the books, bookcases, maps and other Sunday-school paraphernalia pertaining to the Eutaw Street Sunday-School; while the Poor Society of the Eutaw Street Station received from the Poor Society of the Baltimore City Station the sum of about \$3,000 as its share of the ‘poor fund’ held by the latter society at the time of the separation of the two congregations.

After the transfer of the property and the payment of the sums of money above mentioned, the division of the old Baltimore City Station into two separate and independent stations was complete, but at the time this was accomplished the legacies from the estate of Thomas Armstrong were not yet due and payable, because his widow still survived, and, as before stated, by the terms of the testator’s will, the legacies were not payable until after her death.

This event occurred, as we have seen, in the year 1881, and the following year the money was paid to the two legatee corporations, both of whom overlooked or ignored the resolutions adopted at the male members’ meeting on September 27th, 1869, providing for a division of the legacies when received, and retained the whole to their own respective uses and purposes.

It seems that the members of the Eutaw Street Station in the course of the thirteen years that elapsed from the death of Thomas Armstrong until the death of his widow had also

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overlooked or forgotten the fact these legacies had been left to the Asbury Sunday-School Society and to the Poor Society of the old Baltimore City Station before its division into two stations, and also had forgotten the resolutions adopted at the male members' meeting, and so made no demand for the half of either of the funds until the year 1895, when Mr. Joshua S. Rawlings, a member of Eutaw Street Church, and one of those present at the meeting of the male members of the old Baltimore City Station on September 27th, 1869, in looking over the minutes of the proceedings of the church for a long period of years, came upon the resolution first above mentioned. At once, he says, he recollected the circumstances, and exclaimed: "There is the Armstrong legacies, and we have never received a part of them."

Mr. Summerfield Baldwin, who also testified in the case as a witness for the complainants, stated that the resolution referred specifically to the two Armstrong legacies.

The matter was at once taken up with the several defendant corporations, but more especially with the trustees of the Methodist Episcopal Church in the City and Precincts of Baltimore, and a number of years was spent in the fruitless effort to bring about an adjustment of the matter without resorting to law; but as no recognition whatever was given the claims of the complainants or of either of them to any part of either of said legacies, this suit was finally instituted to recover what the complainants contend is justly and fairly due them, to wit, one-half of each of said legacies, with interest.

The first question presented is as to the force and effect of the resolution first above mentioned providing for the equal division of the legacies, when they should be received, between Baltimore City Station, which was the name retained by the Light Street Church after the separation, and the new Eutaw Street Station. As to this question, it is clear whatever may be the force of the resolution in suggesting a fair apportionment of these legacies, it could not have the effect of lawfully dividing them.

The male members' meeting at which the resolution in question was adopted, although consisting of members from all three of the defendant corporations, could not, by any action it might take, bind the two legatee corporations, because the members present were not then acting as a board of managers of these corporations, but only as members of the two congregations then constituting the old Baltimore City Station, who had been called together for the purpose of giving their consent and approbation to the transfer of certain church property and money from the old Baltimore City Station to the newly erected Eutaw Street Station.

It is true that the notice of the meeting stated that its purpose was "to ratify and confirm the award of the arbiters appointed to settle the financial question between the two charges and to authorize the corporation to carry into effect said award," but whatever the award of the arbiters may have been, and it does not appear in the record, the form of the notice could not enlarge the powers of the male members beyond those given them by the charter of the church corporation to which they belonged. These powers were merely to give or withhold their consent and approbation to the transfer of certain church property and money from the old Baltimore City Station to the new Eutaw Street Station.

It is manifest therefore that whatever right the complainants or either of them may have to any part of either of these legacies, such right cannot be traced to or derived from the resolutions in question. But it is contended that independent of the resolutions when a church is ecclesiastically divided, a division of the common property follows as a matter of law.

For this contention there is certainly the warrant of high authority.

In the case of *Niccolls v. Rugg*, 47 Ill. 47, it was held that "in case of a division of a religious society, both parties still adhering to the tenets and discipline of the organization, the property should be divided between them in proportion to their members at the time of such separation."

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In 20 *Am. & Eng. Enc. of Law*, title "Religious Societies," at page 809, the rule is stated generally to be that: "A division of a church made in pursuance of proper authority carries with it, ordinarily, a division of the common property of the organization." Citing *Smith v. Swormsteat*, 16 How. 288 (14 L. ed. 942); *Brooke v. Shacklet*, 13 Gratt 301; *Reeves v. Walker*, 8 Baxter (Tenn.), 277.

The most celebrated of these cases is that of *Smith v. Swormsteat*, *supra*, where the Supreme Court of the United States passed upon the question as to the right of the Methodist Episcopal Church South to a part of the property belonging to a corporation organized by the traveling preachers of the church before the division, in the first place, for the purpose "of circulating religious knowledge," and known as the "Book Concern," which had become a very wealthy corporation, with assets of nearly \$1,000,000.

MR. JUSTICE NELSON, speaking for the Court in that case, said: "The division of the Methodist Episcopal Church having thus taken place in pursuance of the proper authority, it carried with it as a matter of law a division of the common property belonging to the ecclesiastical organization." Somewhat similar views are also expressed in the following cases. *Hale v. Everett*, 53 N. H. 9; *Diocese of Eastern Carolina v. Diocese of North Carolina*, 102 N. C. 442; *Wheelock v. Church*, 119 Cal. 477.

The doctrine as thus expressed is no doubt a fair and reasonable one, but the important question is, how far is it applicable to the facts of this case?

In the first place, while it is conceded that the Bishop, in dividing the old Baltimore City Station, exercised the proper functions of his office, yet that he only undertook to separate and did actually only separate "the ecclesiastical relationship" that had so long prior thereto existed between the two charges composing that station, namely, Light Street and Eutaw Street Churches. Such separation could therefore affect only the common property belonging to some integral part of the church organization.

As to the Society for the Relief of the Poor of the Methodist Episcopal Church of Baltimore Station, its object being to secure and afford pecuniary aid and assistance to the indigent and poor members of the church attached to that station, it was not an ecclesiastical society at all, but rather a benevolent or charitable one, whose work was closely connected with the work of the church, but essentially distinct therefrom; and therefore while affiliated with and auxiliary to the church organization, this society was certainly no integral part thereof. It is obvious, therefore, that the separation of the churches could not affect the property held or owned by this society for its own purposes, and the action of the lower Court in dismissing the proceedings as to this defendant must therefore be affirmed.

As to the Asbury Sunday-School Society, however, it is shown that its members had formed themselves into an association "in connection with the Sunday-schools belonging to the Baltimore City Station of the Methodist Episcopal Church" "for the purpose of teaching children on the Sabbath," and the corporation was by its charter authorized to hold, possess and enjoy real and personal property for the use of the society.

The instruction given in Sunday-schools is almost exclusively religious instruction, and at least one of such schools has for many years been considered a necessary adjunct of every well-organized church.

In the case of *Eutaw Place Baptist Church v. Snively*, 67 Md. 493, CHIEF JUDGE ALVEY, speaking for this Court, said: "The church is not organized simply to maintain a pulpit that its members may receive instructions from that source alone. Other means of religious instructions are as common, and are as much within the provisions of church regulation and direction as the pulpit itself. Prominent among these are the Bible class and Sunday-school."

In the case at bar it was proven that there were two Sunday-schools belonging to the Baltimore City Station of the Methodist Episcopal Church at the time the station was di-

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vided by the Bishop in March, 1869, one connected with the Light Street Church and the other with the Eutaw Street Church, and it is well known that the Sunday-school is one of the ordinary means adopted in church organizations for the promotion of religious instruction and that its work is strictly within the scope of the church's proper functions.

We think therefore that these two Sunday-schools should be taken and considered as integral parts of the church organizations to which they were respectively attached, and necessarily integral parts of the ecclesiastical body divided by the Bishop in 1869. Of course, the Asbury Society was not the Sunday-school of either one of these churches, but it was the legal entity representing both Sunday-schools and holding title to the property of both; and any money or property given to the corporate body before the separation of the two charges would when received unquestionably be held by it for the benefit of both these Sunday-schools.

At the time of the separation of the two charges no money was paid by the Asbury Society to the Eutaw Street Sunday-School because, as testified by one of the witnesses, the Society at that time "had no money except the regular collection from the church for Sunday-school purposes," but it did give to the Sunday-School Society of the Eutaw Street Church the books, bookcases, maps and other property that had been purchased out of the funds of the society for the use of the Eutaw Street Sunday-School.

Had the society, then, the possession of the legacy of \$1,000 from Thomas Armstrong's estate, the Eutaw Street Sunday-School in its corporate capacity would have been entitled to receive also a share of this legacy, for the benefit of its Sunday-school, not only as a matter of fairness and justice, but as a matter of law following the ecclesiastical separation of the two congregations.

Although the Asbury Sunday-School Society had not then the actual possession of this fund, it had a vested right therein to remainder, and after the death of Mrs. Armstrong, in 1881, it received the fund in question and has ever since re-

tained it for the use and benefit of the Sunday-School of the Light Street Church (now known as the First Methodist Episcopal Church), and has paid no part thereof to the Eutaw Street Methodist Episcopal Sunday-School of Baltimore City, a body corporate, for the benefit of the Sunday-school of that ecclesiastical station.

As the right to this legacy was vested in the Asbury Sunday-School Society before the division of the Baltimore City Station, and as the legacy itself was unquestionably intended for the use and benefit of both these Sunday-schools, we think that after the separation "The Eutaw Street Methodist Episcopal Sunday-School," a body corporate, became entitled to a share of this legacy when it should be paid for the use of the Sunday-School of the Eutaw Street Station, of whose funds and property that corporation was then the proper custodian. A fair division of the fund with that corporation would in no wise be a diversion of the legacy from the purpose for which it was originally given, but on the contrary would be really enforcing the application of the fund to those purposes.

According to the rule laid down by the Courts in the cases cited above, the share of the common property to be received by the respective parties to a divided ecclesiastical organization is in proportion to their members at the time of the separation, but here, although the testimony shows that at the time of the separation of Baltimore City Station the Eutaw Street congregation was somewhat the larger, yet as the claim of the complainants is for but a half interest in the legacies, we think a settlement of the dispute should be upon that basis.

There has been much delay in bringing this action, but no defense is made upon the ground of *laches*, and, considering the peculiar circumstances of the case, we are not disposed to refuse relief on that ground.

As to "The Trustees of the Methodist Episcopal Church in the City and Precincts of Baltimore," one of the defendant corporations, neither of the complainants has shown any right of action against it, and the bill of complaint was properly dismissed as to that defendant, as well as to the other defend-

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ant corporation known as the Society for the Relief of the Poor.

The two appellant corporations known as "The Trustees of the Eutaw Street Methodist Episcopal Church of Baltimore City" and "The Society for the Relief of the Poor of the Eutaw Street Station Methodist Episcopal Church of Baltimore" were not necessary parties to this proceeding, but that fact does not deprive the successful complainant of its remedy, and for the reasons we have already assigned we hold that the appellant corporation known as "The Eutaw Street Methodist Episcopal Sunday-School of Baltimore City" is entitled to one-half of the legacy received by the Asbury Sunday-School Society from the estate of Thomas Armstrong, but owing to the unusual conditions surrounding the case no interest will be allowed. We will therefore affirm the decree of the lower Court in part and reverse it in part, and remand the cause to the end that a decree may be passed in conformity with this opinion.

Decree affirmed in part and reversed in part, and cause remanded. Costs to be paid equally by the three unsuccessful contestants.

THE MONUMENTAL BREWING CO. vs. GIRMAN
LARRIMORE.

*Negligence—Wagon Standing Near Car Track—Person on
Footboard of Street Car Struck by Swinging Open of Gate
of Wagon—Instructions—Reference in Prayer
to the Pleadings.*

It is the duty of a person in charge of a wagon standing near a street-car track so to place and manage it, as far as practicable, as not to expose the persons on a passing car to the danger of collision.

Plaintiff, a conductor of a street railway company, was standing on the footboard of an open car, going at half speed, when it approached a large beer wagon which was standing alongside of the track, the outside of the hub being from two and a half to three feet from the track. The plaintiff's evidence was that as the car was passing the wagon its end gate or door was swung open and struck the plaintiff before he could get out of the way. In an action against the owner of the wagon, the defendant's evidence was that the gate was open before the car approached, and that neither its position nor that of the wagon was afterwards changed. *Held*, that since it was the duty of the defendant so to place its wagon and so to fasten the gate or end piece that persons on a passing car would not be injured by the swinging open of the gate, and since if the driver did not himself open the gate he permitted it to be opened, the evidence of the defendant's negligence is legally sufficient to go to the jury.

Held, further, that a prayer offered by the defendant is erroneous which denies the right of the plaintiff to recover if the defendant's servants believed, in the exercise of reasonable care, that the wagon was stopped at a safe distance from the track, so that the gate would not come in contact with anyone on the footboard, and the conductor and motorman thought the same thing. The question is not whether the de-

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defendant's servants believed that they had acted with due care, but whether in fact they had done so.

Held, further that another prayer offered by the defendant is erroneous which denies the right to recover if the wagon was standing with its gate open at a safe distance from the track and the injury to the plaintiff occurred by the suction of the passing car drawing the gate towards it. There is no evidence in the case as to the conjectured suction; and the prayer is also bad in assuming that the wagon was at a safe distance from the track if the suction of a passing car could draw further open the gate.

A prayer will not be held to refer to the pleadings when it merely asserts that under the proceedings in the case the evidence is legally insufficient.

Decided January 13th, 1909.

Appeal from the Superior Court of Baltimore City (ELLIOTT, J.), where there was a judgment on verdict for the plaintiff for \$500.

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON and HENRY, JJ.

S. S. Field, for the appellant.

William R. Barnes (with whom was *Horton S. Smith* on the brief), for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

The appeal in this case was taken by the appellant company from a judgment against it in the Superior Court of Baltimore City for damages for injuries suffered by the appellee under somewhat unusual circumstances. The leading facts relating to the accident in which the appellee was injured appear from the record to have been as follows:

On May 28th, 1907, while the appellee was standing on the footboard on the east side of a moving summer car of the United Railways, in discharge of his duties as conductor of the car, he was struck by the open end gate of one of the appellant company's delivery wagons standing on the east side of the track, and knocked from his car and injured. The car was then going north on the north-bound track on Curtis Avenue, near Cypher Street, and the wagon, with the mules that drew it headed southerly, was standing between the sidewalk and the track with the outside of its hub at a distance of two and a half to three feet from the latter. The precise width of the wagon does not appear, but it was estimated by the witnesses at from two and a half to three and a half feet. The end gate was of nearly the same width, as it fitted into and closed the end of the wagon. The gate was hinged at the side of the wagon and swung open horizontally toward the railway track as the wagon then stood. Two men accompanied the wagon—Jacob Kimmerle, the driver, who was admitted to be in the employ of the appellant company, and his assistant, William E. Creamer, whose relation to the company is a matter of controversy.

The testimony on behalf of the appellee, as plaintiff below, tended to show that as the car approached the wagon it was going at half speed, and that both the motorman and conductor saw the wagon, and that its end gate was not then open, and that, as there was ample room for the car to pass the wagon in that condition, they went ahead; but just as they reached the wagon its end gate swung round toward the car and struck the conductor before he could get out of its way. The motorman testified: "He saw the driver of the wagon opening the gate, but didn't see it 'falling open.' When he was within about a foot of the wagon he saw the driver attempting to open it; he was opening it out towards the car. He passed on by and didn't stop because there was no danger when he was passing. The front of the car was past the wagon when the driver opened the gate. He was about a foot from the rear of the wagon when he saw the gate." On cross-examina-

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tion he admitted that he could not identify the man who opened the gate as the driver, but presumed it was he. The conductor said: "Just after the front of the car passed the driver or someone on the back of the wagon threw the back gate of the wagon open, and it knocked me in the street."

Martin G. Moses testified to having witnessed the accident and that the wagon "was the Monumental Brewing Company's wagon," and said that "two men generally go on them bottled-beer wagons."

On behalf of the appellant company as defendant below, Jacob Kimmerle, in response to the inquiry of its counsel whether he was one of the parties in charge of the wagon, replied: "Yes, sir; I was the driver;" and when asked if anybody else was with him at the time, said that Mr. Creamer was with him, and, in response to the further inquiry whether they were both with that one wagon, replied: "Yes, sir." He further testified that Creamer opened the end gate of the wagon before the car was in sight at all, and that the gate was all of the way back to the side of the wagon, and extended only about six inches from the side of the wagon. He further testified that the gate is really two gates, one opening to the left and the other to the right; "it extended the full width of the wagon; it just goes simply on the inside of the wagon." The wagon was a large one and was about nine or ten inches inside of the hub. He was at the side of the wagon when the accident occurred, between the car and the wagon, right at the rear of the mules, and saw the gate hit the conductor, who was near the rear of the car at the time.

Creamer testified for the company that he wasn't employed by it, but that he was on its wagon working for Mr. Kimmerle. He further testified that on the occasion of the accident the car was about a square away from the wagon when he opened the end gate of the latter, and that he did not move the gate after it was opened nor did the wagon change its position. He also said that the gate was only about six inches away from the wagon when the car approached. He saw the conductor when he was struck looking forward and

having hold of the handle of the car with his left hand. This witness thought that the hub went outside of the body of the wagon about five inches and that the tread of the wagon was about as wide as the car tracks on Curtis Avenue, but it would not track with the rails because they were steam road rails.

There is but one bill of exceptions in the record, and that brings up the action of the Court below on the prayers. The plaintiff offered three prayers, all of which were granted. The defendant offered eight prayers, of which the Court granted the third, fourth, seventh and eighth, and rejected the others.

The form of the plaintiff's prayers, which are appropriate to the appellee's theory of the case, is not made the subject of criticism on the brief of the appellant, which contends, first, that the case should have been taken from the jury for want of legally sufficient evidence to justify a recovery, by the granting of its first and second prayers; or, secondly, that its theory of the case should have been presented to the jury by granting its fifth and sixth prayers.

We are clearly of opinion that the defendant's first and second prayers, which sought to have the case withdrawn from the jury, were properly rejected. Without recapitulating all of the evidence, it was proved beyond controversy that the appellee, while in the discharge of his duty in a place where he had a right to be, was struck and injured by the open and unfastened end gate of the appellant company's wagon, which was swung open in such a situation and under such circumstances that a jury would be justified in finding the person guilty of negligence who was responsible for opening it or permitting it to hang open and unfastened as the car approached and passed.

The party in control of the wagon was charged with knowledge that cars were liable to pass and repass on the electric railway tracks, and it was his duty in allowing the wagon to stand in the public highway near the car tracks to so place and manage it, as far as he reasonably could, as not to expose the occupants or persons in charge of passing cars to danger

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of collision with any portion of it. There is no testimony that there was not space sufficient between the car tracks and sidewalk to have placed the wagon so far from the tracks that its swinging gate would not be liable to get in the way of passing cars, nor that the gate could not easily have been fastened back to the side of the wagon instead of being allowed to hang free.

If the plaintiff's witnesses are to be believed, the gate of the wagon was swung round immediately upon the passing car, although both Kimmerle, the driver, and Creamer say that they saw the car approaching a square off. If, on the other hand, the defendant's witnesses are to be believed, that the gate was opened before the car came in sight, as Kimmerle says, or when it was a square off, as Creamer says, it was permitted to hang open and unfastened until the car with the conductor on the footboard reached it. In either event, there was evidence from which the jury might have found the defendant company guilty of negligence. *Geiselman v. Schmidt*, 106 Md. 585; *B. & O. v. Stebbing*, 62 Md. 515. As the first and second prayers make no reference to the pleadings, the question presented by them was, as has been frequently decided by this Court, whether the facts that might properly be found by the jury from the evidence constituted a good cause of action. *Balto. Bldg. Association v. Muhlbach*, 69 Md. 406; *Walsh v. Taylor*, 39 Md. 592; *Home Friendly Socy. v. Roberson*, 100 Md. 88. The reference to the proceedings in the first prayer cannot be regarded as having been made to the pleadings, as the two words have neither technically nor ordinarily the same meaning.

The pleadings in a case consist of the statements of the litigants in legal form of the facts constituting the cause of action and grounds of defense by which the issue is made up. The proceedings in an action at law, on the other hand, consist rather of the successive acts done and steps taken as parts of the suit during its progress, whether by Court, counsel, clerk or jury. *Words and Phrases*, Vol. 6, p. 5410, 5632-3; *Wilson v. Allen*, 3 How. Prac. 369-71; *Uhe v. Chicago M. &*

St. P. Ry. Co., 54 N. W. 601; *At., Top. & St. Fe R. R. Co. v. Brassfield*, 51 Kans. 167; *Amis v. Smith*, 40 U. S. 313; *United States v. Knight*, 39 U. S. 307. In *Strom v. Montana Cent. Ry. Co.*, 81 Minn. 347, 84 N. W. 46, it was said that the term proceedings in its most comprehensive sense "includes every step taken in a civil action except the pleadings." Without adopting all of the views expressed in the cases to which we have referred, we think that the words "pleadings" and "proceedings" are not sufficiently alike in import to be interchangeably employed in instructions to juries.

When it is desired in framing prayers to make special reference to the pleadings in the case it should be done by referring to them as such.

The defendant's fifth prayer asked the Court to instruct the jury that if they "find that the defendant's servants in charge of its wagon had stopped the wagon and opened the gate, and that in stopping the wagon where they did they exercised reasonable or ordinary care to stop it at a sufficient distance from the track, so that the gate would not come in contact with anyone on the car or footboard, and that in the exercise of such reasonable care they believed that the wagon and gate were a safe distance from the track, and shall further find that the motorman of the car also thought the gate was a safe distance from the car, so that he could safely go by it, then the jury are instructed that there was no negligence on the part of the defendant's servant in charge of its wagon, and the verdict of the jury should be for the defendant."

The sixth prayer was as follows: "If the jury find that the defendant's wagon was standing with its gate open at a safe distance from the car tracks, and that the injury to the plaintiff occurred by the suction from the passing car suddenly drawing the gate towards the car, then the verdict of the jury should be for the defendant."

These prayers were also properly refused. The fifth prayer was based upon the hypothesis that if the jury found that the defendant's servants in charge of the wagon believed in the

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exercise of reasonable care that it was stopped by them at a safe distance from the track, so that the gate would not come in contact with anyone on a passing car or its footboard, and the conductor and motorman on the car thought the same thing, then the defendant was not guilty of negligence and there could be no recovery against it. Now, the evidence of both the conductor and motorman was that they approached the wagon toward its front, and did not see its end gate at all until they were even with the wagon, and that it was under those circumstances that they thought the car could safely pass it. Their conclusion thus arrived at of their ability to pass the wagon in safety could throw no light upon the question of the negligence *vel non* of the management of the end gate by the parties in charge of the wagon. The evidence did not tend to show that they thought they could pass the wagon in safety with its end gate open and swung round toward the car. The sequel showed that the wagon did not stand at a safe distance from the track. The true question in that connection was whether the defendant's servants in charge of the wagon had in fact exercised reasonable care to place it so that cars might pass it in safety, not whether they believed they had done so.

The sixth prayer was bad because it was based upon a mere conjecture of which there was no evidence that the suction from the passing car drew the end gate toward it and so injured the conductor. It was also bad in assuming that the wagon with its end gate hanging open was at a safe distance from the car tracks, if the end gate when drawn by the suction of a passing car would reach and strike its conductor as he passed along its footboard in discharge of his duty.

We have not thought it necessary to consider the question whether there was legally sufficient evidence to go to the jury to show that Creamer, who was said by some of the witnesses to have opened the end gate of the wagon, was one of the defendant's servants in charge of the wagon. We did not enter upon that discussion because, in our opinion, the testimony tending to show that the driver, who was confessedly in charge

of the wagon, permitted its end gate to hang unfastened, after it was open, in such position that it could swing round and injure a person on the footboard of a passing car was of itself legally sufficient evidence to go to the jury of negligence on his part as the servant of the defendant company the owner of the wagon, within the scope of his employment.

The judgment appealed from must be affirmed.

Judgment affirmed with costs.

MARIE L. REED vs. JOHN A. REED.

Effect of Divorce Upon Tenancy by Entireties—Gifts to Husband During Coverture—Evidence Showing Plaintiff Entitled to Relief Not Asked for in Bill—Remanding Cause.

When a wife purchases property with her money and causes it to be conveyed to herself and husband as tenants by the entireties, the effect of a subsequent decree of divorce is to convert the tenancy into a tenancy in common, and it does not entitle the wife to claim the entire ownership.

If a wife, during coverture, voluntarily and without any fraud or undue influence on the part of her husband, conveys her property to him, a subsequent divorce does not operate to vest in her an equitable title or claim to such property.

The provision of Code, Art. 16, sec. 37, which gives to the Court granting a divorce power to award to the wife such property or estate as she had when married, does not authorize that Court or a Chancery Court to annul gifts made by the wife during coverture to her husband.

Plaintiff's bill alleged that she had purchased certain land with her own money and had caused it to be conveyed to herself

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and her husband as tenants by the entireties; that she had since obtained an absolute divorce from him, and the bill prayed that a decree be made declaring her to be the sole owner of the land. The evidence of the plaintiff showed that she had been induced by the demands of her husband, against her will, to cause that conveyance to be made. *Held*, that although the plaintiff is not entitled to the relief asked for under the averments of the bill, yet the cause should be remanded, with leave to amend the bill by alleging that the conveyance was procured by the fraud or undue influence of the defendant, and opportunity given to both parties to produce evidence relating to that allegation.

Decided February 11th, 1909.

Appeal from the Circuit Court for Baltimore County
(DUNCAN, J.)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

John Hinkley and Thos. Foley Hisky, for the appellant.

J. Kemp Bartlett and L. B. Keene Claggett, for the appellee.

THOMAS, J., delivered the opinion of the Court.

The appellant, in her bill of complaint in this case, filed in the Circuit Court for Baltimore County, alleges that she was married to the appellee on the 7th day of September, 1894; that after her said marriage she purchased, on the 22nd day of May, 1896, four lots of the ground near Catonsville, in Baltimore County, and paid the consideration therefor, to wit, the sum of fourteen thousand five hundred dollars, out of her separate funds and estate, and that she caused said lots to be conveyed to herself and the appellant "as tenants by entireties" by the deed, a copy of which was filed with the bill; that on the 11th of December, 1905, by the final decree

of the "Probate, Divorce and Admiralty Division of the High Court of Justice" of England she was absolutely divorced from the appellee, and that she "is advised that in consequence of said divorce she is entitled to have said property decreed to be hers, in her own right, free, clear and discharged of any interest therein of her former husband, from whom she has now been divorced." The prayer of the bill is that the property may be decreed to be the property of the appellant, clear of any interest of the appellee; that a trustee may be appointed, "if necessary," to convey the property to her, and that she may have such other relief as her case may require.

The bill, it is to be noted, does not charge that the property was purchased by the appellee and paid for with money belonging to the appellant, or that the conveyance of the property to her and her husband was procured by the fraud or undue influence of the appellee; but the theory on which the bill was filed is that the appellant having been divorced from the appellee, the mere fact that the property was paid for out of money belonging to the appellant is sufficient to authorize a Court of equity, either under the authority of Art. 16, sec. 37 of the Code, or independently of that section, to restore the property to her.

Without considering or determining whether said section, which confers upon the Court granting the divorce "power to award to the wife such property or estate as she had when married," has reference only to the Court decreeing the divorce, or whether Courts of equity, apart from the statute, have such power, it is clear from the decisions in this State that where a wife during coverture voluntarily and without any fraud or undue influence on the part of the husband, conveys her property to him, the effect of a decree for divorce is not to vest in her an equitable title to such property. It has been repeatedly held by this Court that if a wife gives to her husband property belonging to her separate estate, or permits him to apply it to his own use, or he does so with her knowledge and consent, in the absence of proof that it

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was given to him to be held in trust for her use, or of a promise by the husband at the time to repay it, it will be presumed that it was intended as an absolute gift to him, and she has no claim therefor against him or his estate. *Edelen v. Edelen*, 11 Md. 415; *Kuhn v. Stansfield*, 28 Md. 210; *Farm. & Mer. Nat. Bank v. Jenkins*, 65 Md. 243; *Jenkins v. Middleton*, 68 Md. 540; *Taylor v. Brown*, 65 Md. 366.

In the case of *Tyson v. Tyson*, 54 Md. 35, the bill was for divorce and restoration to the wife of the property belonging to her when married, or the value thereof. The Court below granted the divorce and awarded alimony, but omitted to award to the plaintiff certain property, and because of such omission the appeal was taken from the decree. The property which it was claimed should have been awarded to the wife, consisted of a legacy to her from her father, amounting to \$2,873.75, which had been paid to the husband and wife jointly by the executor of her father's estate, and for which they had executed a joint release. Her claim was resisted on the ground that the legacy had been appropriated and converted by the husband, with the knowledge and consent of the wife, and without any agreement to repay it, or to hold it for her use and benefit. The Court, in construing Art. 16, sec. 37 of the Code, said that it was not contemplated "to authorize the Court to annul all previous dispositions made by the wife during coverture by gifts to her husband or others. * * * If the husband received and applied the fund, whether money, goods or chattels, or collected *choses in action*, with the wife's privity and consent, and without an agreement or promise to repay or restore it, no legal obligation rests on the husband to restore it; no right of action enures to her, and, to that extent, her rights are extinct.

A decree for divorce has no retroactive effect; *per se*, it does not legally restore the *status quo* of the parties before marriage, or annul their voluntary and legal acts during coverture.

Bishop, treating of the consequences of divorce flowing by

law, says: "Coming now to consider the effect of the dissolution of a valid marriage upon property rights, we must remember that the decree of divorce, so far from undoing the original marriage, expressly affirms it, and, therefore, does not restore the parties to their former condition, but places them in a new one. Consequently all transfers of property which were actually executed either in law or fact abide; for example, the personal estate of the wife reduced to possession by the husband remains his after a divorce, the same as before." 2 *Bishop*, 706. Again (p. 731), referring to the effect of a divorce *a mensa*: "This divorce does not at common law, and without statutory aid, change the relation of the parties as to property."

Assuming that the Code confers on the Court the power of awarding the wife all the property she had during coverture, as well as that possessed prior and at the time of the marriage, that power must be qualified by the rights acquired by the husband, or others through him, claiming with her privacy and consent.

If the effect of knowledge and acquiescence on the part of the wife was sufficient to destroy her right as creditor in this case, unless there was an agreement or promise of the husband to repay, it follows necessarily that the conversion of the money by the husband, with the wife's concurrence, and her conjoint act and deed, must equally destroy her right to recover it as her separate property, after divorce, after the lapse of a series of years, without any promise or agreement of the husband to return or to repay it.

There was no loan or trust created between them, but the transaction amounted to an absolute gift. The wife exercised her *jus disponendi* absolutely and without reserve.

Under the averments of the bill, viz, that *she* purchased and paid for the property, and that *she* caused it to be conveyed to herself and her husband, the appellant would not, therefore, be entitled to the relief prayed.

But a great deal of evidence was produced by the plaintiff tending to show that she was induced against her will to have

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the property so conveyed, by the conduct and persistent demands of her husband, and by the defendant, for the purpose of showing that the conveyance was the result of her free and voluntary act; and while, as was said in *Schroeder v. Loeber*, 75 Md. 195, under Art. 5, sec. 36 of the Code, where there were no exceptions in the Court below to the evidence, or to the sufficiency of the averments of the bill, we may decree according to the proof, "whether the *allegata* and *probata* correspond or not," we think, as the bill was filed and the evidence was offered on the theory that the Court was authorized under sec. 37 of Art. 16 of the Code, to restore the property to her, apart from any question of its having been procured by coercion or undue influence, and the attention of her counsel was not, therefore, specially addressed to that feature of the case, that the case should be remanded in order that the bill may be amended, and the parties may have an opportunity to offer additional evidence, if they desire to do so, reflecting upon the question of fraud, coercion or undue influence in the procurement of the deed to the plaintiff and defendant as "tenants by the entireties."

In 2 *Story's Eq.* sec. 1395, the author, after stating that it is now the established doctrine in equity that a married woman may bestow her separate property upon her husband, as well as upon a stranger, says: "But, at the same time, Courts of equity examine every such transaction between husband and wife, with anxious watchfulness and caution and dread of undue influence; and if they are required to give sanction or effect to it, they will examine the wife in Court, and adopt other precautions to ascertain her unbiased will and wishes." A similar expression of the jealous care with which Courts of equity guard the interests of the wife in such transactions is found in *Farmer's Executor v. Farmer*, 39 N. J. Eq. 216, where the Court held that gifts by a wife to her husband "are to be closely inspected on account of the danger of improper influence, but if they appear to have been fairly made, and to be free from coercion and undue influence, they ought to be sustained." And in the case of *Liv-*

ington v. Hall, 73 Md. 386, CHIEF JUDGE ALVEY refers to the above section of *Story's Eq.*, and says that "it has been held by Courts of high authority, and upon full and careful consideration, that a gratuitous conveyance by a wife of her property to her husband will be held void, unless it affirmatively appears from the attending circumstances, or otherwise, that it was her voluntary act, free from any undue influence exercised by her husband." See also *Bradish v. Gibbs*, 3 Johns. Ch. p. 589; *Parks v. White*, 11 Ves. 222; *Whitridge v. Barry*, 42 Md. 140.

If, therefore, the interest of the appellee in the property referred to in this case was obtained by him by coercion or undue influence brought to bear by him upon the appellant, it is the plain duty of a Court of equity to grant her relief.

We fully concur in the conclusion reached by the Court below, and for the reasons stated and upon the authorities cited by that Court, that, as the result of the divorce, the appellant and appellee now hold the property as tenants in common. But for the reasons we have stated the decree will be reversed, and the case be remanded, in order that the bill may be amended and the parties may produce additional evidence if they desire to do so.

Decree reversed and case remanded for further proceedings in accordance with views herein expressed, the costs in this Court and in the Court below to abide the final decree in the case.

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Syllabus.

EDITH TYLER GRIFFITH AND ALFRED J. SHRIVER, TRUSTEE, vs. JOHN T. DALE.

Mortgage Sales—When Costs of Vacated Sale Allowed Out of Proceeds of Second Sale—No Allowance of Counsel and Witness Fees to Trustee Making Sale—Allowance for Insurance Premium—Cost of Stenographer—When Trustee Entitled to Commissions on Rents Collected Before Sale.

When a mortgage sale made by a trustee is set aside, and the trustee has not been guilty of any bad faith or misconduct, the expenses of that sale will be allowed out of the proceeds of a subsequent sale.

When a mortgage sale is set aside upon exceptions filed thereto and another sale ordered, the trustee is not entitled to an allowance out of the proceeds of the second sale for counsel fees paid to a lawyer to oppose the exceptions to the ratification of the first sale.

Nor is the trustee in such case entitled to an allowance for a fee paid to a witness called to testify as a real estate expert in opposition to said exceptions.

A mortgagee, who has insured the property against fire upon breach of the mortgagor's covenant to do so, is entitled to a *pro rata* allowance therefor from the time the insurance was effected to the day of sale, after which time the policy enured to the benefit of the mortgagee, who was the purchaser.

Exceptions to the ratification of a mortgage sale at which the first mortgagee was the purchaser were filed by a junior mortgagee, and after testimony was taken the sale was set aside. Upon the distribution of the proceeds of a second sale, held, that a part of the charges of a stenographer for taking testimony under the exceptions to the first sale was properly charged against the first mortgagee.

When a trustee appointed to make a mortgage sale upon default takes possession of the property and collects the rents there-

of, without an order of Court directing him so to do, and the rents are not paid to the mortgagee, but are brought into Court for distribution in the final audit after the sale, the trustee is entitled to commissions thereon, since the collection was for the benefit of all of the parties and would have been authorized by the Court upon application.

Decided January 20th, 1909.

Appeal from Circuit Court No. 2 of Baltimore City (GORTER, J.)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON and HENRY, JJ.

David Fowler and Alfred Jenkins Shriver, for the appellants.

William S. Bryan, Jr., and John L. G. Lee, for the appellee.

HENRY, J., delivered the opinion of the Court.

Edith Tyler Griffith, one of the appellants, was the owner by assignment of a first mortgage, executed to secure a loan of \$15,000 to John T. Dale, appellee, on the leasehold property of the said Dale, situated on South Howard Street, in Baltimore City. Default having been made by the mortgagor in complying with the covenants of the mortgage, Alfred J. Shriver, one of the appellants, was on the 2nd day of April, 1907, under the provisions of the mortgage, containing an assent on the part of the mortgagor to the passage of a decree for the sale of the mortgaged property, in conformity with the local law for Baltimore City, by the Circuit Court No. 2 of said city, appointed trustee to sell the property in said mortgage described and conveyed. By virtue of this decree, the trustee on the 2nd day of July, 1907, sold the property at public sale for \$16,650, Mrs. Griffith being the

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purchaser, and this sale, upon exceptions filed by John L. G. Lee and Helen Larned, holders of a junior mortgage, was on November 13th, 1907, after the taking of much testimony, set aside and annulled by the Court. Thereafter on the 9th day of December, 1907, the same trustee again sold the property in question at public sale to Mrs. Griffith for \$17,000, and this sale on February 28th, 1908, was finally ratified and confirmed by the Court.

In the distribution of the proceeds of sale, and of rents collected from the property by Shriver amounting to \$2,282.54, the auditor stated two accounts, one known as audit "A," according to his own ideas of what was proper, and another, known as audit "X," under the direction of Shriver, the trustee. The Court, on May 26th, 1908, ratified the former account, with the exception of an allowance of 5% commissions to the trustee on the rents collected by him, and rejected the latter account. In the audit as adopted the expenses of the first sale were allowed, but a fee of \$150 paid by the trustee to Charles Morris Howard, as counsel, in resisting the exceptions made to the ratification, and a fee of \$50 paid to Frank G. Caughy, an expert witness in the proceedings, were rejected, as was also a claim of \$8.65 claimed on account of insurance premiums paid. In said audit there was also deducted from the mortgage claim of Mrs. Griffith the sum of \$62.50, being for a proportionate part of the fee charged by the stenographer in the proceedings on the exceptions.

Because of the foregoing, both Shriver, the trustee, and Mrs. Griffith have taken an appeal here from the order of the lower Court in ratifying the auditor's report.

The record in the case is an extensive one, dealing principally with the evidence adduced in support of and in opposition to the exceptions filed to the ratification of the first sale. As no opinion was filed by the lower Court, we are not advised of its reason for setting aside this sale, but whether it was rightfully or wrongfully done is not before us, and we have no concern with it except so far as the good faith of the trustee in conducting the same may bear upon the pro-

priety of allowing the expenses thereof out of the proceeds of the second sale. It is sufficient for us to say that after an examination of the testimony we find no evidence of intentional wrongdoing on the part of the trustee, however much he may have misconceived his duty in some respects, but his conduct appears to have been characterized by entire good faith, with a view of saving from loss the junior incumbrancers who afterwards successfully attacked the sale. The case of *The Real Estate Trust Company v. Union Trust Co.*, 102 Md. 41, where a resale was ordered because a trustee, acting upon the advice of counsel, failed to file a bond before selling the property, is authority for the general statement that in the absence of bad faith on the part of a trustee the expenses of a first sale should be paid out of the proceeds of a second. The case of *South Baltimore Company v. Kirby*, 89 Md. 52, also sustains this point.

But accepting the foregoing as correct, the question arises as to whether an attorney's fee, such as was paid in this case, is a proper item of expenditure to be charged against the common fund. There is no authority for such an allowance in the mortgage itself, which merely provides for the payment of the costs and expenses of the sale, and the same provision in a power of sale mortgage has been held by this Court to include the cost of advertising, the services of an auctioneer and such other expenses as are necessary to make an advantageous sale, but does not even include the payment of commissions to the party making the sale, much less of a fee to an attorney for defending the ratification of the same. *Johnson v. Glenn*, 80 Md. 369.

There seems to be no inflexible rule of law on the subject, but the general principle, which is justified by sound reasoning and by authority, is that where a trustee employs an attorney to render necessary services for the benefit of all the parties interested in the estate, or seeks advice for the proper administration of his trust, that a reasonable fee, though not specially provided for in the decree, is to be allowed for such services out of the common fund in his possession. In this

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case the attorney did not represent all the parties. On the contrary, he was distinctly hostile to the position taken by the two junior mortgagees. He was employed either by Shriver, the trustee, or by Mrs. Griffith, the purchaser at the sale, or by both of them, and we think should look to them for payment for his services. To allow his fee of \$150 out of the fund in hand, would practically be making the exceptants in the proceedings in the lower Court pay for the services of counsel employed by the other side.

In the case of *Mahoney v. Mackubin*, 54 Md. 277, which was cited with approval in the later decision of *Shaw v. Smith*, 107 Md. 523, where the mortgagee, under a power contained in the mortgage, made sale of certain real estate, he was refused an allowance of \$150 paid to an attorney for successfully defending exceptions to the ratification of the sale. We understand that in this case the sale was made by a trustee, appointed under the statute, rather than by a mortgagee under a power, but the case above referred to is worthy of mention as showing that the Court does not consider the employment of an attorney as a usual expense, but rather as an extraordinary one, to be paid for by the person procuring the same, and only allowed out of a common fund when the services rendered are for the benefit of all the parties interested, and not in hostility to part of them. As shown in this case, the attorney was unsuccessful in maintaining the sale against the exceptions of the two persons immediately interested in the property, and we feel that it would be improper to make them contribute in whole or in part to the payment of his fee. *Miller's Equity*, sec. 564; *McGraw v. Canton*, 74 Md. 554;; 11 *Cyc.* 97.

We likewise think the lower Court correct in refusing to allow the trustee the sum of \$50 paid by him to Frank J. Caughy, an experienced real estate dealer, who was called as an expert witness to controvert the allegation in the exceptions to the effect that the property sold for an inadequate price. To sanction a fee of this character would be opening the door to extravagant expenditures and inviting trustees to

an abuse of the confidence reposed in them. If such a fee were allowed to one witness, it could be allowed to several, or to many, until in the discretion of the trustee he had produced sufficient evidence to maintain the point at issue, and by such practice an estate might be squandered in litigation, to the detriment of the mortgagor or to other claimants of the property. The only safe course is to hold trustees to a strict accountability, allowing such proper costs as are incident to the sale, but forbidding the wasting of a fund by extraordinary expenses in litigation.

In respect to the claim of \$8.95 for difference in allowance for insurance, we see no merit. In audit "A" the trustee was allowed \$39.91 on account of payments of insurance premiums on the property, and in audit "X" he was allowed \$48.86 for the same account. According to the facts of the case, it seems that on March 30th, 1907, Mr. Shriver, who afterwards became the trustee, paid \$57.50 for insurance on the property, the mortgagor having made default in his covenant to do so. The second sale of the property was made on Dec. 9, 1907, and in stating the audit, a *pro rata* amount of the \$57.50, for the period elapsing between March 30th and December 9th, 1907, was allowed to the trustee, as the policy insured after the latter date to the benefit of the mortgagee who was also the purchaser. The appellant trustee claims that he should have been allowed the full \$57.50 less such amount as would have been the return premium had the policy been cancelled on the 9th day of Dec., 1907. It nowhere appears in the record that the policy was so cancelled, or that a premium was returned. Inserted in the record is a letter from the insurance agents to the effect that if such policies had been cancelled the return premiums would have been \$8.63. But we are not dealing with a hypothetical case, and the auditor, under the actual state of facts, properly apportioned the premiums.

As to the deduction of \$62.50 from the claim of the first mortgagee, the same being for a proportionate part of the charges of the stenographer employed in the case, the Court

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likewise made a deduction for the services of the stenographer from the claims of the two junior mortgagees, and in so apportioning these costs, which are not of a strictly necessary or usual character, we must presume that the lower Court acted with sound discretion which it is not the practice of this Court to overrule. Mrs. Griffith was a party to the proceedings, filing a request for the ratification of the sale, and though the record furnishes scant details of her participation in the proceedings which culminated in the setting aside of the sale, we are to assume, in the absence of anything contrary appearing in the record, that the stenographer was employed in her behalf.

In both of the audits the trustee was allowed a commission of five per cent. on \$2,282.54, being the amount of rents collected by him from the property from April 1st, 1907, to December 9th, 1907, the date of the second sale, but the Court rejected this allowance and directed the same to be distributed between the two owners of the second mortgage in proportion to their respective interests.

Shriver, according to the testimony, after default on the part of the mortgagor, on March 30th, 1907, took possession of the mortgaged property in behalf of Mrs. Griffith, the first mortgagee, and the tenant in possession, in compliance with notice to that effect, thereafter paid the rents to him. On the second day of April following, or only three days after taking possession of the property, Shriver filed a petition, as solicitor for Mrs. Griffith, praying for the passage of a decree authorizing a sale of the mortgaged property, and on the same day the Court, under the assent contained in the mortgage, passed such decree, naming Mr. Shriver as trustee to make the sale. The rent falling due April 1st, 1907, having been paid in advance by the tenant to the agent of the mortgagor, all the collections by Shriver were made after his appointment as trustee.

It is urged by the second mortgagee that as the decree gave no power to the trustee to collect the rents, but limited his authority to the sale of the property, in conformity with the

terms of the mortgage itself, and as he had taken possession on behalf of the mortgagee prior to his appointment as trustee, that such collections must be regarded as made for the benefit of the mortgagee, and that under the law no compensation can be allowed for his services. If the facts be conceded, it cannot be denied that the weight of authority is strongly in favor of the legal proposition advanced and the cases cited fully sustain the point. *Gelston v. Thompson*, 29 Md. 601; 4 *Kent's Com.* 167; *Pom. Eq. Jur.*, sec. 1217; *Elmer v. Soper*, 25 N. J. Eq. 483; *Barnard v. Patterson*, 137 Mich. 633, 100 N. W. Rep. 893.

Apparently Shriver was in possession of the property in a dual capacity, one as representative of the first mortgagee, for the purpose of collecting rents for her benefit, and another by virtue of the Court's decree as trustee to sell for the benefit of all the parties. We do not deem it necessary to consider the point as to whether the decree naming a trustee for one purpose had the effect of displacing or superseding the possession of the mortgagee which was for another purpose, for we think a proper decision of this matter may be reached by looking through the form to the substance of the acts done by Shriver. He himself seems to have been doubtful as to his position, for we find him declaring, in an answer to a petition filed for the appointment of a receiver, page 244 of the record (which petition was not acted upon by the Court), that checks for the rent were made payable to himself as trustee and attorney for Mrs. Griffith; that the right to the rents and profits was a substantial one, of which the mortgagee could not be deprived, and at the same time stating that the money collected was being held by him subject to the order of Court. The plain fact remains, nevertheless, that the rents collected were never paid over to Mrs. Griffith as a credit on the principal or interest of her mortgage, but part of the sum was applied to the payment of premium for insurance on the property, part to the payment of ground rents and taxes, and all of it was brought into Court for an accounting and for distribution. These acts were for the benefit of all the parties

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interested in the property, including the second mortgagees and the mortgagor himself, and were not solely for the benefit of the first mortgagee, and were of such a character as could be more justly ascribed to Shriver in his capacity as trustee rather than as attorney for the mortgagee. While it is true that without an order of the Court appointing him, he was without authority to collect the rents, as trustee, yet we think the circumstances of the case appropriately call into operation the familiar maxim that a Court of equity will ratify that when done which, if previously applied to, it would have ordered. Or, as stated in *Gray v. Lynch*, 8 Gill, 426: "It is a settled rule in chancery that when a trustee does, without an application to the Court, an act which would have been ordered, if authority for that purpose had been previously applied for, and at the time of the act being done it was obviously for the benefit of all concerned, such act will be ratified and affirmed, and held of the same validity as if it had emanated from the previous order of the Chancellor."

In *Brown v. Hazelhurst*, 54 Md. 26, and *Abell v. Brown*, 55 Md. 217, will be found illustrations of the salutary application of this equitable rule.

Under the circumstances of this case, in which it seems clear that the value of the property was insufficient to discharge the liens against it, we cannot doubt that the Court, if applied to, would have authorized the trustee to make such collections, and we think for his services he should be paid the reasonable compensation of five per cent. allowed in the audit, which we have referred to herein as audit "A."

The decree of the lower Court, therefore, will be affirmed in part and reversed in part, but as the expensive record contains much irrelevant matter, not necessary for the determination of the questions raised, we think it proper that the costs of this appeal should be paid one-half by the appellants, that is to say, one-fourth by Edith Tyler Griffith and one-fourth by Alfred J. Shriver, and the other half out of the fund.

This disposition of the costs will make it necessary for the

auditor to state another account in conformity with this opinion.

Decree affirmed in part and reversed in part, the costs to be paid one-half by the appellants, that is to say, one fourth by Edith Tyler Griffith and one-fourth by Alfred J. Shriver, and one-half out of the fund.

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One who requests other persons not to give employment to plaintiff, a workman he had discharged, and in doing so makes untrue statements concerning the plaintiff and expresses a desire to make an example of him, is liable in an action for the injury shown to have been thereby caused to plaintiff. *Willner v. Silverman*, 341.

2. When defendant wrote a letter notifying the members of an association, consisting of persons in the same trade, that he had discharged the plaintiff from his service and requested them not to give him employment, and the plaintiff is subsequently refused employment by the members of the association, that is evidence that this refusal resulted from the writing of the letter. *Ibid*.
3. In an action against three persons, individually and as a firm, alleging that they had injured the plaintiff by sending a letter containing false statements concerning him and requesting the members of a trade association to which defendants belonged not to employ plaintiff, the evidence showed that the letter was written by M., one of the defendants, without the knowledge of the others; that M. was an employee not authorized to write such letters; that the writing of this letter was not previously authorized or subsequently ratified by the other defendants, and that the firm was not formed until after the injury complained of. *Held*, that the plaintiff's right of action is against M. only. *Ibid*.
4. Goods of third party taken under distraint for rent—Right of action of owner against tenant.

When the goods of a stranger found on rented premises are seized and sold under a distraint for rent against the tenant, the owner may buy the goods in at the sale, and recover the

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amount paid in an action against the tenant. *Swartz v. G.-B.-S. Brewing Co.*, 393.

ADVERSE POSSESSION.

1. A purchaser may be required to accept a title to land which depends upon adverse possession. *Cook v. Councilman*, 622.

AGENCY.

1. Principal's ratification of agent's tort.

A principal does not ratify an assault committed by his agent, not within the scope of the agent's employment, except by some act done with knowledge of the material facts. *Steinman v. Laundry Co.*, 62.

See **BROKERS**.

LANDLORD AND TENANT, 1

MASTER AND SERVANT.

APPEAL.

1. Conflict between instructions to the jury.

When the repugnancy between two prayers, granted separately, is such that the jury may have been thereby misled, it constitutes reversible error. *Williar v. Nagle*, 75.

2. Appeal from order overruling demurrer to bill without payment of costs.

A defendant may appeal from an order overruling his demurrer to a bill of complaint, although it does not affirmatively appear that he has paid the ten dollars and costs, in compliance with Code, Art. 16, Sec. 154, which provides that a party whose demurrer is overruled shall pay to the opposite party the sum of ten dollars and costs. *Stinson v. Ellicott City, etc., Co.*, 111.

3. In proceeding by landlord against tenant.

When a Justice of the Peace has jurisdiction of the proceedings instituted by a landlord to recover the demised premises, no appeal lies to the Court of Appeals from the action of the Circuit Court on appeal from the Justice to that Court. *Benton v. Stokes*, 117

4. Harmless error in exclusion of evidence.

The error of the trial Court in excluding competent evidence of a certain fact cannot be complained of on appeal when that

APPEAL—*Continued.*

fact was subsequently proved in the case by other witnesses, and the appellant does not appear to have been injured by such exclusion of evidence. *Shockley v. Penn. R. Co.*, 123.

5. Evidence subject to exception.

When evidence has been admitted subject to exception, the appellant cannot avail himself of the exception on appeal unless there was a subsequent motion to strike out the evidence. *Moneyweight Scale Co. v. McCormick*, 170.

6. Harmless errors.

In an action for malicious prosecution, when the declaration does not allege special damage, the plaintiff should not be allowed to testify that he was not able to do as much work after his imprisonment as before, could not sleep, etc. But the admission of such evidence is not reversible error when not followed up by other evidence of a similar character, when the imprisonment of the plaintiff was only from Saturday evening to the following Monday, and when the verdict of the jury was for a small amount and they had been properly instructed as to the measure of damages. *Ibid.*

7. Evidence that plaintiff's counsel had stated in a conversation that there was not a jury in the country that would decide in a certain way, is immaterial, and cannot be complained of by the appellant as constituting reversible error. *Ibid.*

8. Although incompetent evidence was admitted to prove some particular fact, yet the judgment will not for that reason be reversed if the same fact was afterwards proved by competent evidence. *M., D. & V. R. Co. v. Brown*, 304.

9. The admission of incompetent evidence which works no injury to the appellant is not reversible error. *Refrigerating Co. v. Kreiner*, 361.

10. A prayer instructing the jury that they are at liberty to allow interest on a claim should fix the date from which interest should be calculated, but when it appears from the amount of the verdict that the appellant was not injured by the failure of a prayer to fix such date, the defect is not a reversible error. *Oliver & Burr v. Noel Co.*, 465.

11. The failure to state explicitly the measure of damages in an instruction is not reversible error, when it is apparent from the amount of the verdict of the jury, that the appellant was

APPEAL—Continued.

not injured by such defect. *P., B. & W. R. Co. v. Diffendal*, 494.

12. Exception not waived by cross-examination.

An exception taken to the admission of certain evidence when offered is not waived by the exceptant's afterwards cross-examining the witness as to such evidence. *United Rys. Co. v. Corbin*, 442.

13. Exception to competency of expert not necessary.

When objection is made to a question propounded to a medical witness which is overruled and the question answered, the admissibility of the evidence may be determined upon appeal not only upon a consideration of the character of the evidence, but also upon the ground that the witness was not shown to be qualified as an expert to answer the question, although no special objection was made at the trial that he was not competent to testify as an expert. *United Rys. Co. v. Corbin*, 442.

14. Delay in transmission of record.

The record on appeal in this case was not transmitted to the Clerk of the Court of Appeals until more than two months after the time prescribed therefor by Code, Art. 5, Sec. 33; and since it is not shown that the delay was caused by the neglect or inability of the Clerk of the Court from which the appeal was taken, or of the appellee, the appeal is dismissed. *Estep v. Tuck*, 528.

15. Reference to pleadings in prayer.

A prayer will not be held to refer to the pleadings when it merely asserts that under the proceedings in the case the evidence is legally insufficient. *Monumental Brewing Co. v. Larrimore*, 682.

16. Remanding equity cause with leave to amend and offer proof.

Plaintiff's bill alleged that she had purchased certain land with her own money and had caused it to be conveyed to herself and her husband as tenants by the entireties; that she had since obtained an absolute divorce from him, and the bill prayed that a decree be made declaring her to be the sole owner of the land. The evidence of the plaintiff showed that she had been induced by the demands of her husband, against her will, to cause that conveyance to be made. *Held*, that although the plaintiff is not entitled to the relief asked for

APPEAL—Continued.

under the averments of the bill, yet the cause should be remanded, with leave to amend the bill by alleging that the conveyance was procured by the fraud or undue influence of the defendant, and opportunity given to both parties to produce evidence relating to that allegation. *Reed v. Reed*, 690.

17. Motion in trial Court to strike out judgment after appeal taken.

After a judgment rendered in a Court of Baltimore City has become enrolled by lapse of thirty days, under Local Code, Art. 4, Sec. 317, and an appeal therefrom entered, bond to stay execution filed, and the record transmitted to the Court of Appeals, the trial Court has no jurisdiction to entertain a motion to strike out the judgment on the ground of surprise and fraud. *United Rys. Co. v. Corbin*, 52.

18. The affirmance of a judgment by the Court of Appeals precludes the lower Court from vacating it, unless the cause be remanded for further proceedings. *Ibid.***19. Non-reversible error.**

In an action by the widow and infant child of a man to recover damages for the defendant's negligence which caused his death, evidence is not admissible to show that the plaintiffs have no property or means of support. When such evidence has been improperly admitted, but it is apparent from a comparison of the amount of the verdict and the amount earned by the deceased in his lifetime, that the defendant was not injured by the admission of such evidence, it is not reversible error. *Consol. Gas. Co. v. Smith*, 186.

20. Discretion of trial Court in criminal case.

A motion by a traverser in a criminal case to require the State to elect between certain counts in the indictment is addressed to the discretion of the trial Court, and no appeal lies from its action thereon, unless there be some abuse of the discretion resulting in injury to the traverser. *Lanasa v. State*, 602.

21. Under an indictment for conspiracy, a motion by the traverser to require the State to file a bill of particulars is addressed to the discretion of the trial Court. *Ibid.***22. Discretion of trial Court in cross-examination of witness.**

The trial Court has a large degree of discretion as to allowing, or refusing to allow, a witness to be asked on cross-examina-

APPEAL—Continued.

tion questions which are not clearly connected with his testimony on direct examination, especially when the questions relate to matters which can be proved by other witnesses, or by that witness himself if called by the cross-examining party. *Consol. Gas Co. v. Smith*, 186.

ARCHITECTS.

See **CONTRACTS**, 5, 8.

ASSAULT AND BATTERY.**1. Insufficient evidence.**

The evidence is insufficient to support an action of assault and battery when it is merely to the effect that an employee of the defendant, a laundry company, called at the plaintiff's house and, in spite of plaintiff's protest, took certain blankets from a chair on which they were lying, and that, in so doing, his knee accidentally came in contact with plaintiff's knee. *Steinman v. Laundry Co.*, 62.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See **SET-OFF**, 2, 4.

BAILMENTS.

See **WAREHOUSEMAN**.

BILL OF LADING.

See **CARRIERS**, 9, 11.

BLACKLISTING.

See **ACTION OR SUIT**, 1.

BROKERS.**1. Stop order to sell.**

A stop order is a direction given by the purchaser to the broker to the effect that if the stock touches the price named in the order, while it is being held, the broker shall sell it at the best available price; but it does not impose an obligation upon the broker to hold it until it reaches that price. *Richter v. Poe*, 20.

BROKERS—Continued.**2. Real estate broker's right to commissions.**

Municipal officers agreed to pay plaintiff, a real estate broker, certain commissions if he negotiated the purchase of land for the municipality. Plaintiff endeavored, without success, to obtain from the owner of the land desired by the city an offer or agreement to sell at a price acceptable to it. Afterwards the municipality announced its purpose to obtain the land by condemnation, and then the landowner agreed directly with the city to submit to arbitration the question of the price to be paid, and the city acquired the land upon the payment of the award of the arbitrators. In an action by the broker to recover commissions on the sale, *held*, that since the sale had not been effected as a result of his efforts or negotiations, he is not entitled to recover. *Martien v. Baltimore City*, 260.

See CONTRACTS, 1, 4.

CARRIERS.**1. Delay in transportation of freight—Liability of intermediate carrier—Evidence.**

In an action against an intermediate carrier to recover damages for its delay in the transportation of freight, a memorandum showing the time of the arrival of the cars carrying the freight at certain points, which memorandum is a copy and not the original record, is not admissible in evidence. *Shockley v. Penn. R. Co.*, 123.

- 2.** When freight is to be transported over two or more connecting roads, each road is liable only for failure to carry safely and promptly over its own line, when there is no agreement imposing upon a road extra-terminal liability for delay. *Ibid.*
- 3.** Plaintiff shipped fruit to Boston from a place in Maryland. The shipments passed over three connecting roads before being delivered to the defendant company in Philadelphia, by which they were carried thence to Jersey City, and there delivered to another carrier for final transportation. In an action against the defendant, this intermediate connecting carrier, to recover damages for its delay in the transportation of the fruit, which resulted in its being delivered in Boston in a damaged condition and too late for the market on the day for which it was designed, the evidence showed that the

CARRIERS—Continued.

fruit was delivered in good condition to the initial carrier at a certain time, but there was no evidence as to the time when the cars in which the fruit was loaded left the starting point, or as to when they were delivered to the next carrier or to the defendant, or as to what was a reasonable time for transportation over the several roads. *Held*, that since the burden of proof was upon the plaintiff to show that the delay complained of occurred on the defendant's road, and there is no evidence to show when defendant received the fruit or when it was delivered to the next carrier, the jury was properly instructed that there was not legally sufficient evidence to entitle the plaintiff to recover. *Ibid*.

4. **Presumption that freight was delivered in good condition to terminal carrier—Duty of carrier to ice refrigerator car and transport with diligence—Burden of proof—Instructions—Evidence.**

In an action against a terminal carrier, by which goods were delivered in a damaged condition, if it be shown that the goods were in good condition when given to the initial carrier, the presumption is that they were in the same condition when delivered to the defendant, the next carrier, and the burden is upon it to show by way of defense that the goods came to its possession in a damaged condition. *P., B. & W. R. Co. v. Diffendal*, 494.

5. When a carrier accepts for transportation a refrigerator car containing fruit, it has implied notice of the perishable nature of the freight, and is liable for a loss resulting from its failure to ice the car properly or to transport it with due diligence. *Ibid*.
6. Plaintiff's evidence showed that on the evening of September 30, he loaded a refrigerator car with peaches in good condition, the ice bunkers being full of ice; that the car was consigned from a point on the Western Maryland Railroad to a dealer at Washington, D. C.; that the car arrived in Baltimore next morning, October 1st, at 6.30 o'clock, and was there delivered to the defendant company at 8.20 o'clock for transportation to Washington; that the consignee looked for the car on October 1st, but the car did not arrive until after 5 o'clock in the evening of October 2nd; that the bunkers then had no ice in them, the inside of the car being very warm and

CARRIERS—*Continued.*

some of the peaches spoiled; that in an iced refrigerator car, peaches will keep for ten days, but if the car be not iced, then they are more injured than they would be by exposure to the sun in the open air. The defendant offered no evidence. *Held*, that the burden of proof was on the defendant to show that the damage was not due to any default on its part, and that the jury was properly instructed that the plaintiff was entitled to recover unless they find that the damage was not caused either by the failure of the defendant to transport the car with reasonable dispatch, or by its failure to use due care to ice the car. *Ibid.*

7. When a witness testifies that a car arrived at a terminal connecting point at 6.30 A. M. and was delivered to the connecting carrier at 8.20, omitting to state whether this was 8.20 A. M. or 8.20 P. M., the jury may properly infer that this latter hour also has reference to the morning. *Ibid.*

8. Damages for loss of market.

When a carrier is sued for damage resulting from its delay in the transportation of fruit, it is not necessary for the plaintiff to show that the defendant had actual notice that the fruit was intended for a certain market. The carrier is liable for the damage caused by its delay whether the loss was occasioned by a fall in the market price, or by damage to the goods themselves, or by a combination of the two causes. *Ibid.*

9. Provision in bill of lading that negligence shall not be presumed—Action against two connecting carriers—Evidence.

When a bill of lading provides that negligence shall not be presumed against the carrier, then the burden of proof is cast upon the shipper to prove that an injury to the goods was caused by the negligence of the carrier. *Merchants & Miners' Trans. Co. v. Eichberg*, 211.

10. While a common carrier cannot contract against liability for its own negligence, yet it may make an agreement that puts the burden of proving its negligence upon the shipper. *Ibid.*
11. A bill of lading provided that if the shipper should elect not to accept the reduced rate at which the goods would be carried under a condition that negligence is not to be presumed against the carrier, then he should give notice in writing to the agent of the carrier, and by paying a somewhat higher rate, the common law liability of the carrier would attach

CARRIERS—Continued.

except as limited by statute. *Held*, that when a shipper chooses to accept the reduced rate, he is bound by the provisions of the bill of lading, which put upon him the burden of proving that damage to the goods in the course of transit was caused by the negligence of the carrier. *Ibid*.

12. When goods transported by two connecting carriers are delivered in a damaged condition, an action of tort may be brought against both carriers. *Ibid*.
13. The plaintiff shipped goods, as both consignor and consignee, from Atlanta, Ga., to Baltimore, Md., under a bill of lading issued by the railroad company which first received the goods and carried them from Atlanta to Savannah, and there delivered them to a steamship company for final transportation to Baltimore. Upon receiving the goods, the plaintiff alleged that they had been damaged in the course of transit and brought this action against both carriers. The bill of lading provided that no carrier should be liable for loss or damage not occurring on its portion of the route, and that negligence should not be presumed against any carrier. In said action, the plaintiff offered no evidence to show that the damage had been caused by the negligence of either carrier. *Held*, that, since under the bill of lading, no negligence can be presumed against the railroad company from the mere fact that the goods which had been delivered to it in good condition were received at their destination from the steamship company in a damaged condition, the trial Court properly instructed the jury that the plaintiff is not entitled to recover against the railroad company, because there was no legally sufficient evidence in the case that the goods were injured when in its possession by its negligence. *Ibid*.
14. *Held*, further that it was error on the part of the trial Court to refuse to instruct the jury, at the request of the steamship company, that there was no legally sufficient evidence that the goods were damaged while in its possession, and that therefore, under the pleadings, the plaintiff was not entitled to recover against that company. *Ibid*.
15. **Time for making claim for damage—Waiver.**
The stipulation in a bill of lading requiring a claim for damage to the goods to be made in writing within thirty days after delivery is waived when the agent of the carrier, with full

CARRIERS—Continued.

knowledge of the facts, makes no objection on that ground to a claim presented by the shipper. *M. & M. Trans. Co. v. Eichberg*, 211.

16. Computation of loss.

If the bill of lading stipulates that the amount of loss or damage for which the carrier is liable shall be computed at the value of the property at the time and place of shipment, then it is not necessary, in an action to recover such damage, to prove the value of the property at the place of delivery. *Ibid.*

17. Contract of shipment in letters and bill of lading.

When before a shipment is made, the agent of the carrier writes a letter to the shipper stating the terms upon which freight will be carried, and the correspondence between the parties refers to the bill of lading, then the contract of shipment is contained in the letters and the bill of lading construed together. *M. & M. Trans. Co. v. Eichberg*, 211.

18. Contributory negligence of passenger—Instruction.

In an action by a passenger against a carrier to recover damages for a personal injury, it is not necessary that the defense that the passenger was guilty of contributory negligence should appear from the evidence adduced by the defendant. If the plaintiff's own evidence shows that he was negligent that is a bar to the action. *United Rys. Co. v. Riley*, 327.

19. Consequently, in a case where the inference of plaintiff's contributory negligence could be legally drawn from his testimony, it is error to instruct the jury that from the fact of the injury to the passenger, a presumption arises that it resulted from the carrier's negligence, and that the passenger is entitled to recover unless the defendant shows that the injury could have been avoided by the exercise of ordinary care on the part of the plaintiff. *Ibid.*

20. Injury from runaway electric car to passenger on platform—Instructions.

Plaintiff got upon the rear platform of defendant's electric railway street car, which was standing still, and just afterwards, while he was about to enter the car, in which there was room, and as the car started, an unmanned runaway car on the same track crashed into the platform on which the plaintiff was standing, facing towards the front and not aware of the danger, and injured him so severely that it was necessary to cut

CARRIERS—Continued.

off one of his legs. *Held*, that since the jury could have found from the plaintiff's evidence that he was negligent in remaining on the platform when he had had time to go inside the car, it was error to instruct the jury that if they found that the plaintiff was a passenger on one of defendant's cars and was injured by a collision between that and another of defendant's cars moving on the same track, then the presumption is that the injury resulted from the negligence of the defendant, and plaintiff is entitled to recover unless the defendant shows that said injury did not result from its negligence, or that the accident could have been avoided by the exercise of ordinary care on the part of the plaintiff. *United Rys. Co. v. Riley*, 327.

21. The fact that a passenger stood on the rear platform of a street electric railway car when there was room for him inside the car, and was injured in consequence of being in that position, does not constitute contributory negligence as matter of law which bars a recovery of damages for the injury, unless that position on the platform exposed him to an obvious danger. Generally in such cases, the question whether the passenger was guilty of contributory negligence is one of fact for the jury. *Ibid.*
22. When the plaintiff testifies that he was standing on the platform of a car only for a moment and was about to go inside, but before he could do so the injury to him happened, the defendant has no right to have the jury instructed that plaintiff cannot recover if he took an exposed and dangerous position on the car, and was injured by reason of his taking such position. *Ibid.*

CONSPIRACY.

See **CRIMINAL LAW**, 4-9.

CONSTITUTIONAL LAW.**1. Title of Statute.**

The title of the Act of 1865, Chap. 14, is "An Act to incorporate the Pocomoke Bridge Company." The statute empowered the company to build a bridge across the Pocomoke River in Worcester and Somerset Counties. Section 12 of the Act required the County Commissioners of Somerset

CONSTITUTIONAL LAW—*Continued.*

County to pay annually to the Bridge Company the sum of six hundred dollars, and the County Commissioners of Worcester to pay annually to it the sum of seven hundred dollars. *Held*, that this section is invalid because in conflict with Constitution, Art. 3, Sec. 29, which prescribes that the subject of every law shall be described in its title. No one could infer from the title of this Act that any such legislation as this was contemplated by it. *Somerset County v. Pocomoke Bridge Co.*, 1.

2. Unconstitutionality of one part of a statute invalidating another.

When one section of a statute is void because in conflict with a Constitutional provision, another section, which is so connected with that section that it would not have been enacted as an independent provision, is likewise invalid, but the remaining part of the statute which is not inseparably connected with those two sections will be upheld. *Ibid.*

3. The Act of 1865, Ch. 14, incorporating the Pocomoke Bridge Company, between Somerset and Worcester Counties, provided in Section 11, that the residents of those two counties and all non-resident taxpayers of those counties should pass over said bridge free of toll, but that other persons using it should pay certain rates. Sec. 12 provided that the County Commissioners of those two counties should pay certain sums annually to the Bridge Company. *Held*, that since it is obvious that the exemption from the payment of tolls was given to the residents of those counties by section 11 in consideration of the payments directed to be made by section 12, the fact that section 12 is invalid, because in conflict with the Constitutional provision requiring the subject-matter of every law to be set forth in its title, also renders invalid section 11, because that section is inseparably connected with section 12; but the remaining part of the Act is valid. *Ibid.*

4. Acquiescence in invalid statute.

The fact that payments have been made by County Commissioners for a number of years in pursuance of a statute, does not operate to estop them from questioning its validity. *Somerset County v. Pocomoke Bridge Co.*, 1.

5. Title of Statute.

The provision in the Act of 1908, Ch. 654, relating to street

CONSTITUTIONAL LAW—Continued.

railway tracks is not invalid as being in conflict with the constitutional direction as to the titles of statutes. *Anne Arundel County v. United Rys.*, 377.

6. Due process of law in criminal prosecution.

When the count in the indictment under which the defendant was convicted was sufficient in law, his sentence thereunder is not in violation of the constitutional provision, that in criminal prosecutions the accused shall have the right to be informed of the nature of the accusation against him and shall not be deprived of life or liberty without due process of law. *Lanasa v. State*, 602.

7. Cruel punishment.

Threatening letters demanding money had been sent to one Di G. by members of a gang called the Black Hand. He refused to comply with the demand, and a dynamite bomb was exploded in the rear of his dwelling house, causing much damage. The defendant was found guilty of a conspiracy to injure and destroy Di G.'s property, and a sentence of ten years' imprisonment was imposed. *Held*, that this sentence is not a cruel or unusual punishment within the constitutional inhibition. *Ibid*.

See MUNICIPAL CORPORATIONS, 8.
TAXATION, 7.

CONTINGENT REMAINDERS.

See DEVISE AND LEGACY, 1.

CONTRACTS.**1. Wagering—Purchase of shares on margin.**

If, under the semblance of a contract for the purchase of shares of stock at a future time, the intention of the parties is that the shares shall not be delivered and paid for, but that one party shall pay to the other the difference between the contract price and the market price at the date of settlement, then such agreement is a gambling or wagering contract. It is consequently illegal and no action lies upon it. *Richter v. Poe*, 20.

2. But a speculative contract for the purchase of stocks, when the buyer deposits a margin as security for his performance of the contract, is not necessarily a wagering contract. *Ibid*.

CONTRACTS—Continued.**3. Burden of proof.**

When a party alleges that the contract by which he purchased shares of stock from a broker on a margin was a gambling transaction, and seeks to avoid the same, the burden of proof is upon him to establish that allegation. *Ibid.*

4. Agreement to carry shares of stock.

Plaintiff ordered a stock broker, the defendant, to purchase certain shares of stock, and deposited a sum of money as a margin on the transaction, and also executed a mortgage to the broker as further security. There was no agreement between the parties that the shares were not to be delivered. The broker purchased the shares for the plaintiff and was ready to deliver the same upon demand. The price declined on the market, and, upon plaintiff's failure to pay for and receive the shares or to furnish additional margin, after notice, the broker sold the same on the stock exchange. Plaintiff then filed the bill in this case alleging that the purchase of the stock was a wagering contract, and also that the defendant had agreed to carry the stock for the plaintiff until it should decline to forty-five dollars per share, in consideration of which agreement plaintiff had executed the mortgage, but that the defendant, in violation of this agreement, had sold the stock at fifty-six dollars per share. The bill prayed that the mortgage be cancelled and that the defendant be required to repay the plaintiff the money deposited as a margin. *Held*, that the evidence fails to support the allegations of the bill or to show that the defendant had agreed to carry the stock for the plaintiff as therein alleged. *Ibid.*

5. Right of architect to recover compensation for plans—Cost of building in excess of estimate—Instructions.

If an architect is employed to prepare plans and specifications for a building which is to cost not more than a certain sum, he is not entitled to compensation unless the building can be constructed under his plans at a cost reasonably near that designated in the estimate. *Williar v. Nagle*, 75.

6. Ordinarily the question whether a building can be constructed under the architect's plans at a price which reasonably approximates the designated estimate should be submitted to the finding of a jury. *Ibid.*

7. But when an architect is employed to make plans for a build-

CONTRACTS—*Continued.*

ing whose cost is not to exceed \$90,000, and the lowest bid received for its construction under his plans is for \$125,000, the Court may rule, as matter of law, that his estimate did not reasonably approximate the cost of construction. *Ibid.*

8. In an action by an architect to recover compensation for building plans prepared by him, the defendant alleged that there was either an express agreement between them that the plaintiff was to receive no compensation for his services unless the building could be erected according to his plans for a sum not to exceed \$90,000, or that there was an implied agreement or condition to that effect. The lowest offer received by defendant for the erection of the building, under the plans furnished by plaintiff, was for \$125,000. The trial Court granted a prayer offered by the plaintiff to the effect that he was entitled to recover unless the jury found that it was distinctly understood and agreed that he should not receive any compensation unless the building to be constructed under his plans, would cost less than a certain sum, and that the same could not be built for that sum. The trial Court also granted defendant's prayer instructing the jury that if they found that the plaintiff undertook to prepare plans for a building to cost not over \$90,000, and that the plaintiff prepared plans for such building, and requested bids thereon, and that the lowest bid received was \$125,000, then their verdict must be for the defendant. *Held*, that the defendant's prayer is not a mere modification of that of the plaintiff, but there is a direct conflict between the two; that under the plaintiff's prayer he was declared to be entitled to recover unless the jury found that there was an express agreement as to the cost of the building, while the evidence showed also an implied agreement to that effect, which would be equally a bar to plaintiff's recovery, and this defense was presented by the defendant's prayer; and that since the jury may have been misled by this repugnancy between the prayers, the granting of them separately constituted reversible error. *Williar v. Nagl*, 75.
9. In said action another prayer offered by the defendant instructed the jury that if they found that there was an understanding between plaintiff and defendant, that the services for which suit was brought, should not be paid for unless a building could be erected according to the plans prepared by the plaintiff for a sum not exceeding \$90,000, then their verdict

CONTRACTS—Continued.

must be for the defendant. *Held*, that this prayer is erroneous because it does not submit to the jury the question whether the building could be erected for the sum mentioned. This error is not cured by the fact that the account filed by the plaintiff with his declaration, which was under the Baltimore City Practice Act, admitted that the lowest bid for the erection of the building was for \$125,000. *Ibid*.

10. When sub-contractor bound by specifications of original contract.

When a sub-contractor agrees to do certain work on a building in accordance with the specifications of the original contract, he is bound by such specifications, and in an action by him against the contractor to recover for work done, the jury was properly instructed that if plaintiff's work was not done according to the specifications, and by reason thereof the defendant suffered loss, then he is entitled to an allowance against the plaintiff for the same. *Oliver & Burr v. Noel Co.*, 465.

See CORPORATIONS, 1

GUARANTY.

MORTGAGES, 5.

SPECIFIC PERFORMANCE.

CONTRIBUTORY NEGLIGENCE.

See CARRIERS, 18, 20.

MASTER AND SERVANT, 4.

NEGLIGENCE.

CORPORATIONS.**1. Divisibility of contract by corporation valid in part and invalid in part—Compensation for services rendered.**

A contract by a corporation to issue a certain number of shares of stock to a person in consideration of his transfer of property to it, and to pay that person a certain sum of money for services to be rendered, is divisible, and if the agreement to issue the shares of stock is invalid, because not ratified by the stockholders in the manner prescribed by statute, the other agreement as to employment is valid. *Miller v. Cosmic Cement Co.*, 11.

2. A corporation was organized to make cement, etc., according to a secret formula and process invented by one W., who

CORPORATIONS—*Continued.*

agreed to transfer the same to the company in consideration of ninety thousand dollars of its capital stock, and of ten thousand dollars as compensation to W. for his services to the company as chemist, of which two thousand dollars was to be paid in cash and two hundred dollars per month thereafter until said sum should be fully paid. This agreement was made with the Board of Directors only. Code, Art. 23, Sec. 69, provides that subscriptions to the capital stock of a corporation in property shall not be received unless previously authorized by the stockholders in general meeting. After W. had served as chemist in pursuance of the agreement for some months, the company became insolvent, and upon a distribution of its assets, W. claimed to be entitled, as a creditor, to the extent of ten thousand dollars, less payments made to him. *Held*, that although the agreement to issue the shares of stock to W. was invalid because in violation of the statute, yet the agreement to employ him as chemist was valid. *Ibid.*

3. *Held*, further that W. is entitled to claim as a creditor for the sum of two thousand dollars, which was to be paid him in cash, upon beginning the services, and for the stipulated salary of two hundred dollars per month until the receiver was appointed, less amount paid him on account. *Ibid.*
4. *Held*, further that of this total claim W. is entitled to the full amount of salary for three months before the appointment of the receiver, and that on the balance of his claim he should be allowed a dividend as a general creditor. *Ibid.*

5. Effect of insolvency on contract of employment.

When the insolvency of a corporation renders impossible the further performance of a contract of employment, the person rendering the services is entitled to compensation to the extent of his part performance, according to the contract price. *Miller v. Cosmic Cement Co.*, 11.

6. Subscriber to capital stock not liable until whole amount is taken—Waiver of this condition.

When the number of shares and the amount of the capital stock of a corporation are fixed by its charter, a subscriber to the shares of stock is not liable on his subscription until the whole number of shares have been unconditionally subscribed. *Morgan v. Landstreet*, 558.

7. A subscriber to the original capital stock of a corporation does

CORPORATIONS—*Continued.*

not waive the defence that all of the stock was not taken by making his subscription at a time when he knew that the corporation was already engaged in business in a small way without having all of its stock subscribed for, but when a larger business was then contemplated, and when, although he was elected a director, he never qualified as such, or attended a meeting of the directors or stockholders, and did not participate in the business carried on by the corporation. *Ibid.*

See MUNICIPAL CORPORATIONS.

RELIGIOUS SOCIETIES.

COSTS AND COUNSEL FEES.

1. Irrelevant matter in record on appeal.

When certain documents not constituting a proper part of the record are inserted therein at the direction of a third party, he will be ordered to pay the costs of the same. *Estep v. Tuck*, 528.

2. Counsel fee for examination of title of lessee claiming right of redemption.

When a lease provides that the lessor shall convey the fee simple to the lessee or his assigns at their request and cost and charge, the lessor cannot claim a counsel fee for the examination of the title of an assignee of the leasehold in order to ascertain if he is entitled to the benefit of the covenant. *Hollander v. Central Metal Co.*, 131.

See APPEAL, 2.

MORTGAGES, 14, 15, 16.

COVENANTS. •

See LANDLORD AND TENANT, 4, 5.

CRIMINAL LAW.

1. Statute prohibiting sale of condensed skimmed milk.

Code, Art. 27, Sec. 235 (Act of 1900, Chap. 532), provides that no condensed or preserved milk shall be manufactured or sold unless it be made from pure milk, from which the cream has not been removed either wholly or in part, nor unless it contain a designated proportion of milk solids. *Held*, that this statute prohibits the sale of a product labelled as condensed skimmed milk, made from milk from which the

CRIMINAL LAW—Continued.

greater part of the cream had been taken, although such product, manufactured in this manner, was not known when the Act of 1900 was passed, and although Code, Art. 27, Sec. 233, authorizes the sale of skimmed milk when sold as such. The object of the statute is not to prevent fraud or imposition, but to prohibit the sale of an article deemed by the Legislature to be lacking in some of the qualities of healthy food, and hence it makes no difference that the article is not sold as condensed milk, but as condensed skimmed milk. *Reiter v. State*, 235.

2. Election between counts.

A motion by a traverser in a criminal case to require the State to elect between certain counts in the indictment is addressed to the discretion of the trial Court, and no appeal lies from its action thereon, unless there be some abuse of the discretion resulting in injury to the traverser. *Lanasa v. State*, 602.

3. Bill of particulars.

Under an indictment for conspiracy, a motion by the traverser to require the State to file a bill of particulars is addressed to the discretion of the trial Court. *Ibid.*

4. Conspiracy—Sufficiency of indictment—Repugnancy between verdicts on different counts—Uncorroborated evidence of co-conspirators.

A combination between two or more persons to accomplish by unlawful means an object not in itself criminal, or to accomplish an unlawful object, is an indictable conspiracy, although no act is done in furtherance of the object. *Lanasa v. State*, 602.

5. The offense of conspiracy is complete in such cases by the unlawful agreement and combination of the parties. *Ibid.*

6. An indictment charging that the defendant conspired with others wilfully and maliciously to injure and destroy the property of a named person is valid, and it is not necessary that the indictment should describe the particular property which was the object of the conspiracy. *Ibid.*

7. The crime of conspiring to destroy a man's property is completed by the combination, although the conspirators have not determined what particular property should be destroyed. *Ibid.*

CRIMINAL LAW—*Continued.*

8. The seventh and eighth counts of an indictment charged the defendant with a conspiracy wilfully and maliciously to injure and destroy the property and dwelling house of one Di G. The third count charged a conspiracy to injure and destroy the property of Di G. The defendant was acquitted on the seventh and eighth counts and found guilty on the third. *Held*, that there is no repugnancy between these verdicts. *Ibid.*
9. The crime of conspiracy may not be established upon the uncorroborated evidence of accomplices and co-conspirators connecting the accused with the crime. *Ibid.*

DAMAGES.

See CARRIERS, 8, 15, 16.

TROVER, 2.

DESCENT AND DISTRIBUTION.

1. Grandnieces of deceased intestate entitled to the exclusion of cousins—Representation among collaterals.

When a man dies intestate, seized of real estate which he acquired by purchase, and leaving as his only relations grandnieces and first cousins, the land descends to the grandnieces to the exclusion of the cousins, under Code, Art. 46, sec. 19. *Hoffman v. Watson*, 532.

2. In such case, the grandnieces are likewise entitled to the personal property of the intestate to the exclusion of his cousins, under Code, Art. 93, sec. 127. *Ibid.*
3. Code, Art. 46, sec. 19, in providing for the descent of land of which the owner dies intestate, directs that if the estate was vested in him by purchase, and there be no child or descendant of the intestate, then the estate shall descend to his brothers and sisters of the whole blood, and their descendants in equal degree, equally. Section 21 provides that if there be no brother or sister or descendant thereof, and no father or mother of the intestate, then the land shall descend to the grandfather on the part of the father, and, if he be not living, to his descendants in equal degree. Section 27, directs that in the descending or collateral line, the children of a deceased father or mother shall by representation be considered in the same degree as their parent would have been, "provided that

DESCENT AND DISTRIBUTION—*Continued.*

there be no representation admitted among collaterals after brothers' and sisters' children." A man died intestate, without issue, seized of land acquired by purchase, leaving as his only relations two grandnieces, the descendants of his deceased sister, and certain cousins, being children of an uncle of the intestate. *Held*, that under the plain language of section 19, the grandnieces of the intestate, being descendants of a sister, are entitled to the land; that the cousins can only inherit under section 21, which is subordinate to section 19, in the event of there being no descendants of a brother or sister of the decedent; that the proviso in section 27, limiting the right of representation to the children of brothers and sisters, only applies when there are brothers and sisters or nephews and nieces, and does not apply when there are none of these, but only grandnephews or grandnieces; that in such event, these latter take by virtue of being descendants, according to the direction in section 19, by inheritance and not by representation; that the effect of the proviso in section 27 is to prevent grandnieces from sharing with nephews and nieces, these latter taking by representation the shares of their parents. *Ibid.*

4. Code, Art. 93, sec. 126, in providing for the distribution of the personal property of an intestate who shall die without leaving a child or parent, directs that a brother or sister or child or descendant of a brother or sister, shall have the whole. And section 127 provides that every brother and sister of the intestate shall be entitled to an equal share, and the child or children of a brother or sister of the intestate shall stand in the place of such brother or sister. *Held*, that if there be no brother or sister or child of either, but there is a descendant of a brother or sister, such descendant takes the personal property in preference to any other collateral relations. *Ibid.*

DEVISE AND LEGACY.

1. Contingent remainder may be devised when limited to designated person—Construction of residuary clause.

When a contingent remainder after a life estate is limited to a person who is definitely described, it may be devised by him, although he dies before the happening of the contingency which is to vest the estate in him. *Fisher v. Wagner*, 243.

2. When a testator disposes by a residuary clause of "all the rest

DEVISE AND LEGACY—Continued.

and residue of my estate, real, personal and mixed of which I may die possessed," and there is no apparent intention on his part to die intestate as to any property which he could bequeath, then a contingent remainder limited to him after an existing life estate passes under the residuary clause. *Ibid.*

3. A testator devised property to be held in trust for his daughter Aminta during her life, with remainder to her children, and in case she should die without leaving a child or descendants, he gave one-third part thereof to his son Robert, his heirs, personal representatives and assigns, absolutely. Robert died in 1881, leaving a will disposing of all of his estate. The daughter Aminta died in 1908 without issue. *Held*, that the contingent remainder given to Robert in the event of the death of Aminta without leaving issue, passed under his will and that his legatees are entitled to the same to the exclusion of his next of kin. *Ibid.*

4. Rule in Shelley's Case.

A testator devised a tract of land to his nephew for and during the term of his natural life with power to dispose of the same by last will, and if the nephew should die without disposing of the same by last will, then the land was devised to the children which the nephew may leave living at the time of his death, their heirs and assigns forever; but if the said nephew should die without leaving a child or children or descendant thereof, and without disposing of the land by last will, then the land was devised to such person or persons as would, under the laws of the State of Maryland, inherit the same as the heirs of the nephew if he had died intestate seized in fee. *Held*, that this devise operates, under the Rule in Shelley's Case, to vest a fee simple title to the land in the devisee. *Cook v. Councilman*, 622.

5. Power of appointment.

When land is devised to one for life with power of appointment by last will, and, in default of appointment, to his right heirs, the remainder limited to the right heirs becomes an executed fee in the life tenant under the Rule in Shelley's Case, subject to be divested by the execution of the power of appointment. *Ibid.*

DIVORCE.

See HUSBAND AND WIFE, 1, 2.

ELECTRICITY.

See NEGLIGENCE, 5, 7, 12, 16, 17.

EMBEZZLEMENT.

See MALICIOUS PROSECUTION, 7.

ENTIRETIES.

See HUSBAND AND WIFE, 1.

EQUITY.**1. Coming into Court with clean hands.**

Upon the failure and insolvency of a firm of which the plaintiff was a member, he surrendered to its creditors all his interest in the firm, and all of his individual property. Before these creditors were paid, plaintiff began a new business as the sales agent of manufacturers, in which he employed one S. as his clerk, and in order to prevent the proceeds of the sales to be made by him as agent from being attached by his former creditors, he placed his bank account and insurance in the name of S. Afterwards, when S. claimed to be the owner of this business, plaintiff filed a bill for injunction and other relief against such claim. *Held*, that the purpose of the plaintiff in thus placing his bank account in the name of S. was not to defraud his creditors, who were afterwards fully satisfied, and that consequently he is not disentitled to the relief sought, by reason of the maxim that he who comes into equity must come with clean hands. *Lord v. Smith*, 42.

2. Enforcement against non-resident of contract concerning land.

The State has control over real property within its limits, and may provide by statute that the contractual obligations of a non-resident owner relating to such property may be enforced against him, after reasonable notice by publication, without personal service. *Hollander v. Central Metal Co.*, 131.

3. Notice by publication.

When the order of publication warning a non-resident owner of a suit instituted by the tenant to redeem a ground rent, in pursuance of a covenant in the lease, describes the property as being situated on a certain street, and the ground rent as one of a certain amount, created by lease of a certain date, executed by designated parties, and recorded in designated

EQUITY—Continued.

land records, there is a sufficient notice to the defendant of the subject-matter of the suit under Code, Art. 16, Sec. 177, which directs that published notice shall be given of the substance and object of the proceedings. *Ibid.*

4. Who is a non-resident.

A former resident of this State who has been in Europe for a year and a half, and who is now in New York for certain purposes, may be proceeded against as a non-resident under Code, Art. 16, Sec. 117, although he has not acquired a fixed residence elsewhere, and intends to return to this State at some indefinite time in the future. *Ibid.*

5. Who may set for hearing on bill and answer.

When a case is heard upon petition (or bill) and answer alone, without evidence, the averments in the answer are taken to be true, but only the petitioner (or the plaintiff) has the right to set the cause for hearing on petition and answer alone. *Hollander v. Central Metal Co.*, 131.

See INJUNCTIONS.

SPECIFIC PERFORMANCE.

TRUSTS AND TRUSTEES.

ESTOPPEL.

See CONSTITUTIONAL LAW, 4.

EVIDENCE.**1. In action for blacklisting.**

In an action to recover damages for having been unjustifiably blacklisted, which prevented him from obtaining employment, the plaintiff cannot be asked: "What reason, if any, was given by the various people to whom you applied, for their refusal to employ you." *Willner v. Silverman*, 341.

2. Hearsay—Telephone.

When one, after talking over the telephone with a person at a distance, repeats what that person said to the witness, then present with him during the conversation, the witness cannot testify as to what was so repeated to him, since it is hearsay. *Ibid.*

3. Opinion of expert as to cold storage cellar.

When the question is whether a cellar in defendant's cold storage warehouse, and the ice-box in which plaintiff's poultry

EVIDENCE—Continued.

had been put, were properly constructed or not, a witness who was in charge of the cold storage department of another company, and had so been for eight years, who had been in the cold storage business for upwards of twenty years, and who had inspected cold storage plants in several cities, is qualified to testify as an expert as to what is the proper and usual construction of ice boxes, etc. *Refrigerating Co. v. Kreiner*, 361.

4. Hypothetical question to medical expert.

A hypothetical question put to a medical expert must not only be based upon the facts in evidence, but must not give a false coloring to those facts by unduly emphasizing some of them or not mentioning others. *Miller v. Leib*, 414.

5. In an action against a medical man for ignorance and negligence in the diagnosis and treatment of plaintiff's broken hip, there was evidence that at the time of suffering the injury and afterwards, plaintiff had tuberculosis, and the evidence was to the effect that the treatment of a patient for a broken hip should be different if that patient also has tuberculosis from what it should be if the patient's general health is good. Under these circumstances, a hypothetical question to a medical expert as to the proper treatment for the surgical injury which fails to mention the tuberculosis of the patient is erroneous. *Ibid.*

6. Qualification of medical expert.

A graduate of a reputable medical school who has practiced medicine for five years is qualified to testify as a medical expert. *Annapolis Gas Co. v. Fredericks*, 595.

7. Opinions of medical experts.

When the question at issue is whether the plaintiff's injury was the result of contact with a wire charged with electricity or whether it was the result of having been frightened by a flash from such wire, plaintiff's physician having testified that she was suffering from hysteria, produced by a shock or injury and not by disease, a medical witness, not qualified to testify as an electrical expert, or as a medical expert acquainted with the effects of electric currents, cannot be allowed to testify that in his opinion the condition of the plaintiff was more probably the result of an electric shock than the result of a nervous shock from mere fright. *United Rys. Co. v. Corbin*, 442.

EVIDENCE—*Continued.*

8. A medical witness ought not to be allowed to testify that the nervous condition of the plaintiff, alleged to have been caused by defendant's negligence, is such that it would not be proper for her to marry, since his opinion, based entirely on plaintiff's nervous condition, must needs be more or less speculative. *Ibid.*

9. A physician of some years' experience as a practitioner, but who is not an alienist or specialist in mental diseases, who attended plaintiff when she received the injury complained of and afterwards, is entitled to testify as to his opinion of the ultimate effect of the injury upon her mind. *Ibid.*

10. Experts as to the effects of electricity.

A physician who testifies that he had had two electrical shocks himself and had had three patients suffering from such shocks, may be asked whether in his opinion the condition of the plaintiff, when he examined her, was such as might probably have been produced by an electric shock. *United Rys. Co. v. Corbin*, 442.

11. A witness who is qualified only as an expert as to the effects of electricity on the human body cannot testify as to whether a person can receive an electric shock from a wire which did not touch his person or clothing. *Ibid.*

12. Opinion as to how accident occurred.

When defendant's locomotive engine, which had been left standing alone on a side track, ran away and collided with an engine on which plaintiff was serving, the defendant company's master mechanic cannot be asked to state how the accident happened, when he did not examine the runaway engine before the accident, and did not see it at the time, and only examined it after it had been wrecked by the collision. *M., D. & V. R. Co. v. Brown*, 304.

13. As to existence of defect.

Plaintiff, a locomotive engineer on defendant's road, was injured in August by collision with an unmanned runaway engine. He testified that in the previous July he had operated the latter engine; that it was old, and in bad shape, and that the throttle-bar would work open and put it in motion. *Held*, that this evidence is admissible without proof that the defect continued to exist down to the time of the accident. Such defect is continuous unless repaired, and it was for the defendant to show that repairs had been made. *Ibid.*

EVIDENCE—Continued.**14. Admitted without objection.**

When incompetent evidence has been admitted without objection it will be treated as properly in the case. *Ibid.*

15. In action by passenger against carrier for personal injuries.

Evidence that before receiving the injury for which the action was brought, the plaintiff had made arrangements to go into a certain business is not admissible. *United Rys. Co. v. Riley*, 327.

16. In such action, evidence that the plaintiff had married after the accident is not competent, but the admission of such evidence is not a material error in a case when the jury was properly instructed as to the measure of damages. *Ibid.*

17. Opinion of witness.

When all of the facts in regard to the sending out of a letter have been proved, a witness cannot be asked for his opinion as to circumstances attending the issue of the letter. *Willner v. Silverman*, 341.

18. In rebuttal.

When a witness for the defendant has testified that the insulation on a wire was in good condition two weeks before the injury was caused, evidence is admissible in rebuttal to show that shortly before the time referred to by this witness the insulation of the wire was broken off. *Consol. Gas. Co. v. Smith*, 186.

19. Answer responsive.

On the trial of a case wherein it was alleged that plaintiff was injured in consequence of defendant's failure to supply a safe engine for use on its road, the plaintiff was asked to describe the type of the engine in question. He replied: "I cannot exactly tell what type she was; the only thing I can tell you is that she was old and worn out apparently when they got her." *Held*, that this answer is fairly responsive to the question, and a motion to strike it out was properly overruled. *M., D. & V. R. Co. v. Brown*, 304.

20. As to earning capacity.

In an action to recover damages for personal injuries caused by defendant's negligence, it is competent to show how the injuries affected the earning capacity of the plaintiff by evidence of what his earnings were before the injury and what he was capable of earning, and did earn, afterwards. *Ibid.*

EVIDENCE—Continued.**21. As to usage of railway company.**

When the question is whether the defendant railway company was or was not negligent in its management of live engines left standing on a side track, evidence as to the particular custom or usage of that defendant in such management is not admissible, since that custom might be either careful or negligent, and in itself does not aid in determining the question at issue. *Ibid.*

22. When the injury constituting the cause of action resulted from a runaway railway engine, a witness cannot be asked to state the custom of railroad companies as to leaving engines in the yard with steam up. Such question is too vague, and is not limited to the custom of well-conducted roads. *Ibid.*

23. Cross-examination of witness.

The trial Court has a large degree of discretion as to allowing, or refusing to allow, a witness to be asked on cross-examination questions which are not clearly connected with his testimony on direct examination, especially when the questions relate to matters which can be proved by other witnesses, or by that witness himself if called by the cross-examining party. *Consolidated Gas Co. v. Smith*, 186.

24. Inferences of witness.

In an action for an injury caused by a defectively insulated electric wire, witnesses cannot be asked to state their inferences, based on facts proved, as to the knowledge possessed by the injured party as to the danger of such wires. *Ibid.*

25. Photographs.

Photographs of the place where the accident happened which is the cause of action are admissible in evidence when shown to be correct representations, but the testimony of the photographer himself is not necessary. The preliminary evidence as to the correctness of the photographs is addressed to the discretion of the trial Court and from its determination in the premises no appeal lies unless there be a plain abuse of the discretion. *Ibid.*

26. Opinion of witness as to cutting of insulation on wire.

When it is shown that plaintiff's deceased was killed by contact with an electric light wire at a point where the insulation had been sharply cut away, the foreman of a telegraph company, of many years' experience, may testify that, in his opinion,

EVIDENCE—Continued.

the wire had been cut for the purpose of locating trouble and testing. *Ibid.*

27. Experiment to test visibility of object.

A telegraph lineman, while at work on a pole, was killed by touching the uninsulated wire of an electric company strung on the pole. A witness who placed himself in the exact position of the lineman at the time of receiving the shock, testified that from that position, the deceased could not have seen the bare place on the electric wire, because certain heavy gauge wires were between the line of vision and the electric wire. *Held*, that this evidence is admissible, being the result of an experiment to ascertain as a fact, and not as an opinion, whether the range of vision of the deceased was obstructed or not. *Ibid.*

28. As to plaintiff's poverty.

In an action by the widow and infant child of a man to recover damages for the defendant's negligence which caused his death,, evidence is not admissible to show that the plaintiffs have no property or means of support. When such evidence has been improperly admitted, but it is apparent from a comparison of the amount of the verdict and the amount earned by the deceased in his lifetime, that the defendant was not injured by the admission of such evidence, it is not reversible error. *Ibid.*

29. Entries made in course of business.

Entries in a book relating to the inspection of locomotives, made in the course of his duty by a person now absent from the State, are admissible in evidence upon proof of his handwriting. *Sims v. American Ice Co.*, 68.

30. Memorandum to refresh recollection of witness.

If a witness testifies that he made an entry or memorandum in accordance with the truth of the matter as he knew it to exist at the time of the occurrence, of which he is at the time of testifying still convinced, he may use such memorandum to refresh his recollection as a witness, although the memorandum does not awaken in his memory recollection of what is contained in it. *P., B. & W. R. Co. v. Diffendal*, 494.

When a witness after consulting a memorandum made by him remembers the facts and testifies from his own recollection of the same, it is of no consequence whether the paper used is the memorandum or a copy thereof. *Ibid.*

EVIDENCE—Continued.**31. Privileged communication—Statement to lawyer.**

Statements made to a lawyer are not privileged communications and as such inadmissible in evidence, unless made while the relation of attorney and client existed between the parties, or unless made during negotiations looking to the establishing of such relation and which concerned professional advice. *Lanasa v. State*, 602.

32. When three persons were indicted for conspiracy, statements made by one of them to counsel for another, who was not the legal adviser of the person making the statement, are not privileged communications, although, after they were made, there was some talk of his becoming also counsel for the one making the statement, but no such relation was ever established between them. *Ibid.*

33. Relevancy.

In an action against an electric company for an injury caused by its defective wire which was strung on the same pole with the wires of a telegraph company, when there is no evidence that the telegraph company could be held liable as a joint wrongdoer, the plaintiff cannot be asked on cross-examination if she had not made a bargain with the telegraph company to sue only the electric company. Such a question is only calculated to mislead the jury as to the issue in the case, which is negligence *vel non* of the defendant. *Consol. Gas Co. v. Smith*, 186.

34. When the declaration sets forth the claim of the plaintiff as a real estate broker to recover commissions for effecting the purchase of certain land for the defendant, evidence is not admissible to show that the plaintiff rendered services in the purchase by the defendant of other lands. *Martien v. Baltimore City*, 260.

34a. In an action against a warehouseman to recover damages for alleged negligence in the custody of poultry stored for plaintiff in defendant's refrigerator cellar, evidence is not admissible to show that other poultry stored by defendant for plaintiff on previous occasions had kept for some months in a good condition; but since such evidence works no injury to the defendant its admission is not reversible error. *Refrigerating Co. v. Kreiner*, 361.

35. Telephone conversation.

Evidence that a witness summoned a physician at a certain time

EVIDENCE—Continued.

by telephone and that he responded is admissible, although the witness did not recognize his voice, when it is shown that he did afterwards call in response to the summons. *Miller v. Leib*, 414.

36. In rebuttal.

It is within the discretion of the trial Court to allow a plaintiff to offer evidence in rebuttal which was properly admissible as evidence in chief. *Ibid.*

37. Judicial notice of location of cities.

The Court will take judicial notice of the location of two such large cities as Baltimore and Washington, of the distance between them, and of the time required for the transportation of a railroad car from one city to the other. *P., B. & W. R. Co. v. Diffendal*, 494.

38. Admission against interest.

Although a statement from account books not proved to have been duly made is not competent evidence, yet, when a party has admitted the correctness of such statement, it is competent evidence as an admission against interest. *Richardson v. Anderson*, 641.

See **CARRIERS**, 7, 9.

MALICIOUS PROSECUTION.

MASTER AND SERVANT.

NEGLIGENCE.

WAREHOUSEMEN.

EXECUTORS AND ADMINISTRATORS.

See **WILLS**.

EXPERTS.

See **APPEAL**, 13.

EVIDENCE, 3-11, 26.

FOOD.

See **CRIMINAL LAW**, 1.

GEOLOGICAL SURVEY.

See **HIGHWAYS AND STREETS**, 1.

GIFTS.

**1. Gift of savings bank deposit to take effect on death of donor—
Testamentary disposition.**

A woman said to the teller of a bank that she wished to deposit a sum of money in the savings department in her name, and so that in the event of her death, it should be payable to one Jones. In the book of deposit then given to her, the entry was as follows: "Frederica Crisp, in case of death payable to E. Jones." Afterwards she gave the deposit book to Jones, accompanied by declarations showing her intention that he should have the sum so deposited upon her death. Under the rules of the bank, the money could not be paid without the production of the book. *Held*, that this transaction did not constitute a valid gift *inter vivos*, since the donee did not obtain control over the fund in the lifetime of the donor, and that it is not effectual as a gift to take effect upon her death, because not executed in the manner prescribed by law for a testamentary disposition. *Jones v. Crisp*, 30.

* See HUSBAND AND WIFE, 2.

GUARANTY.

1. When promise to save harmless not a guaranty.

The defendant was the contractor for the erection of a building according to certain specifications, and sub-let a part of the contract to the C. Company, which in turn sub-let its contract to the plaintiff company. The work as done by the plaintiff was not satisfactory and was condemned, whereupon defendant refused to pay the C. Company, which accordingly refused to pay the plaintiff. Then the plaintiff promised the defendant that if it would pay the C. Company, so that the company would pay it, the plaintiff would hold the defendant harmless against any loss it would sustain and be responsible for any damage. Upon the faith of this promise, the defendant paid the C. Company. In an action to recover for work done for the defendant company under another contract, defendant's plea of set-off alleged that in consequence of the manner in which the work had been done under the sub-contract with the C. Company, the defendant had been subjected to a loss greatly in excess of plaintiff's claim. *Held*, that this plea is a valid set-off, and plaintiff's promise to be responsible for any loss if defendant would pay the C. Company was not a contract of guaranty, but was an original undertaking,

GUARANTY—Continued.

upon the faith of which defendant surrendered its claim against the C. Company. *Oliver & Burr v. Noel Co.*, 465.

HIGHWAYS AND STREETS.

1. Road improvement under Act of 1904, Ch. 225, distinct from building of roads under other statutes—Injunction by taxpayer to restrain construction of road when statute is not complied with.

The Act of 1904, Ch. 225, established a system for the improvement of highways at the joint expense of the State and of the counties, under the supervision of the State Geological and Economic Survey. It provided that in the improvement of a road under the Act, the County Commissioners should give written notices to the chief engineer of the survey of their intention to improve the road, which must be approved by the survey; that the advertisement for bids for doing the paving must be published for two consecutive weeks; that no contract for the same should be awarded if all bids exceed the amount specified. *Held*, that these requirements are not merely intended to safeguard the interests of the State, and are not merely directory, but they are for the benefit of the public generally and especially for the benefit of State and County taxpayers; that proceedings under this Act cannot be aided by provisions of the general law relating to the powers of County Commissioners in the repair of roads, and that a taxpayer is entitled to maintain a bill for an injunction restraining the execution of a contract for a road improvement made in violation of these statutory requirements. *Anne Arundel County v. United Rys. Co.*, 377.

2. The Act of 1904, Ch. 225, creates a method for the improvement of highways at the joint expense of the State and the counties distinct from, and independent of, the provisions of existing public general and local laws conferring upon County Commissioners power to construct and repair roads at the expense of the several counties. The two systems cannot be combined in the improvement of any one road. *Ibid*.
3. Kind of road to be built by State Geological Survey.

The Act of 1904, Chap. 225, Sec. 4, provides that a road to be constructed under the system established by that Act, shall be a macadamized, or a telford, or other stone road, or a road

HIGHWAYS AND STREETS—Continued.

constructed of gravel or of other good material. *Held*, that under this section, the choice of the kind of road to be constructed in any particular locality is confided to the judgment of the Geological Survey, and they may select a roadway of vitrified brick. *Ibid*.

4. Requiring change in location of street railway tracks.

The title of the Act of 1908, Ch. 654, is, an Act to repeal certain designated sections of the Code of Local Laws, title Anne Arundel County, sub-title, Roads, and all other local or general laws inconsistent with the provisions of the Act, and to re-enact the same with amendments. In the body of the Act, the Commissioners of that county were authorized to compel any railway company having tracks on the roads of the county, to change the rails and the location of the tracks and to pave and keep in repair the roads covered by the tracks with the same kind of paving material as might be used on the remaining portion of the road. At the time of the passage of this Act, the legislative charter of the Curtis Bay R. Co. (Act of 1890, Chap. 505) required that company to place its tracks on the margin of the roads along which it ran, and authorized the use of a certain rail. At the same session of the Legislature in 1908, a bill was introduced to compel that railroad company to change the location and character of its tracks, which bill failed to pass. *Held*, that the provision in the Act of 1908 relating to street railway tracks is not invalid as being in conflict with Constitution, Art. 3, Sec. 29, which requires the subject-matter of every law to be described in its title. *Ibid*.

5. *Held*, further, that this Act does not repeal by implication, and was not intended to repeal, the provision in the charter of the Curtis Bay R. Co. relating to the location of its tracks, and that the County Commissioners are not authorized to require that company to change the location. *Ibid*.
6. When the charter of an electric railway company authorizes the location of its tracks in a certain way, the Legislature can require a change in the location only upon fair principles of indemnity in respect to expenditures made by the company in reliance upon its charter. *Ibid*.

HUSBAND AND WIFE.**1. Effect of divorce upon tenancy by entireties.**

When a wife purchases property with her money and causes it

HUSBAND AND WIFE—Continued.

to be conveyed to herself and husband as tenants by the entirety, the effect of a subsequent decree of divorce is to convert the tenancy into a tenancy in common, and it does not entitle the wife to claim the entire ownership. *Reed v. Reed*, 690.

2. Gifts by wife to husband during coverture—Subsequent divorce.

If a wife, during coverture, voluntarily and without any fraud or undue influence on the part of her husband, conveys her property to him, a subsequent divorce does not operate to vest in her an equitable title or claim to such property. *Reed v. Reed*, 690.

3. The provision of Code, Art. 16, sec. 37, which gives to the Court granting a divorce power to award to the wife such property or estate as she had when married, does not authorize that Court or a Chancery Court to annul gifts made by the wife during coverture to her husband. *Ibid.*

INDICTMENT.

See **CRIMINAL LAW**.

INHERITANCE.

See **DESCENT AND DISTRIBUTION**.

INJUNCTIONS.**1. Against interference with business—Question of ownership.**

The plaintiff's bill in this case alleged that defendant had been employed for a number of years as a salaried clerk in a business established by plaintiff, but that the defendant had recently claimed to be the owner. The defendant alleged that he was the sole proprietor of the business, and that the plaintiff had served as his clerk. The bill prayed for an injunction restraining the defendant from interference with the business or property of the concern, and from soliciting its patrons. The evidence examined and *held* to establish the allegations of the bill and to entitle the plaintiff to the relief prayed. *Lord v. Smith*, 42.

2. Averments in bill for injunction against interference with land.

A bill of complaint by a turnpike company alleged that they had obtained by grant from one C., now deceased, then the owner of land now owned by the defendant, the right to construct

INJUNCTIONS—*Continued.*

its road on his land, and that the defendant had built a fence on the road which lessened its width, and was about to build another fence. The bill prayed for an injunction, and for the removal of the fence already erected, and for general relief. No deed or other exhibit was filed therewith. *Held*, that a demurrer to the bill should be sustained since it fails to show how the plaintiff company acquired its rights in the land, or what the extent of such rights were, or whether the alleged grant from the former owner of the land was binding on the defendant. *Stinson v. Ellicott City, etc., Co.*, 111.

See HIGHWAYS AND STREETS, 1.

MUNICIPAL CORPORATIONS, 6.

INSURANCE.

1. Accident insurance—Death of insured from a disease caused by external accident—Instructions to the jury.

There may be a recovery under an insurance policy against death caused by external and accidental agencies when the death of the insured resulted from a disease which was itself caused by an accident, for in such case the accident is to be regarded as the predominant cause of death, and the disease as a link in the chain of causation. *General Accident, etc., Co. v. Homely*, 93.

2. In one part of an accident insurance policy the liability of the company was limited to injuries resulting from external and accidental agencies independently of all other causes. In a subsequent part of the policy, it was provided that in the event of injury, fatal or otherwise, of which there shall be no external or visible mark on the body, or injury, fatal or otherwise, or disability due wholly or in part, directly or indirectly, to disease or bodily infirmity, then the limit of the company's liability shall be one-fifth of the amount which would otherwise be payable under the policy. The insured while at work, on October 20th, in a stable, was struck on the back by a bale of hay and knocked down. There appeared afterwards a welt upon his back and a tremor and tension of muscles, and on October 27th, he died from acute nephritis. Previous to the accident he was in apparent good health. The evidence of the attending physician was to the effect that a blow over the kidneys may cause acute nephritis, with uræmic poisoning, often resulting in death, and that the insured died

INSURANCE—Continued.

of traumatic nephritis, the result of the accident. *Held*, that the jury was properly instructed, at the instance of the plaintiff, that if they found the above facts, and that the deceased was insured by the defendant, and that he was at the time of the accident free from disease, except acute nephritis caused by the accident, then their verdict must be for the plaintiff. This prayer does in effect, although not expressly, require the jury to find that the death was caused by an accident independently of all other causes. *Ibid*.

3. *Held*, further, that the evidence in the cause was legally sufficient to show that the death of the insured was caused by the accident. *Ibid*.

4. *Held*, further, that a prayer offered by the insurance company was properly rejected which instructed the jury that if, at the time of the accident, the insured was suffering from a pre-existing disease, in the absence of which the accident would not have caused his death, then their verdict must be for the defendant. It was also proper to reject a prayer which declared that the death must have been caused by the external injury alone. These prayers disregard the second clause of the policy which made the insurer liable to the extent therein stated for injury, fatal or otherwise, due wholly or in part to disease or bodily infirmity. *Ibid*.

5. **Insurance of rents against loss by fire—Construction of policy—
Delay in rebuilding caused by obstructions in streets.**

A policy insuring a landlord against loss of rents from the destruction of the demised property by fire, provided that the assured should rebuild in as short a time as the nature of the case would admit; that the loss should be computed from the time of the fire and cease upon the premises again becoming tenantable, and that in case the assured should elect not to rebuild, then the loss of rents should be determined by the time which would have been required for such other purpose. Also, that the company should not be liable for loss occasioned by ordinance or law regulating the construction or repair of buildings, or by interruption of business, manufacturing processes or otherwise. The buildings, whose rents were insured, were destroyed in a general conflagration, and delays in rebuilding were caused by the action of the municipal authorities in refusing permits to rebuild until certain street improvements were determined upon, and also on account of a delay

INSURANCE—Continued.

occasioned by the condition of the streets in the vicinity, which were obstructed with the debris of other buildings. It was held upon former appeal that the insured could not recover for loss of rents during the time the rebuilding was prevented by the action of the municipality in refusing permits. *Held*, upon this appeal, that the assured is also not entitled to recover for loss of rents during the period of a delay in rebuilding caused by the obstruction of the neighboring streets as a result of the general conflagration. *Palatine Ins. Co. v. O'Brien*, 100.

6. Plea of tender.

In a suit on a policy insuring a landlord to a certain amount against loss of rents by fire, from the day of the fire until the time the building could be restored by the landlord by the exercise of reasonable diligence, the defendant company tendered by plea the amount of rent accruing for a certain period after the fire, alleged to be a reasonable time for rebuilding, and paid the same in Court. At the trial of the action, the defendant offered a prayer instructing the jury that the plaintiff could recover only nominal damages because there was no evidence of the amount of rents actually lost by the plaintiff on account of the destruction of the building. *Held*, that this prayer was properly refused, because under the policy the plaintiff was obliged to take immediate possession of the premises for the purpose of rebuilding, thus putting an end to the obligation of the tenant to pay rent, and it will be presumed, in the absence of evidence to the contrary, that such possession was taken; and also because, by its payment into Court, under its plea of tender, the company is precluded from alleging that the plaintiff had lost no rent. *Ibid*.

INTEREST.

See **APPEAL**, 10.

JUDGMENTS.**1. Motion in trial Court to strike out judgment after appeal taken.**

After a judgment rendered in a Court of Baltimore City has become enrolled by lapse of thirty days, under Local Code, Art. 4, sec. 317, and an appeal therefrom entered, bond to stay execution filed, and the record transmitted to the Court

JUDGMENTS—Continued.

of Appeals, the trial Court has no jurisdiction to entertain a motion to strike out the judgment on the ground of surprise and fraud. *United Rys. Co. v. Corbin*, 52.

2. The affirmance of a judgment by the Court of Appeals precludes the lower Court from vacating it, unless the cause be remanded for further proceedings. *Ibid.*

LANDLORD AND TENANT.

1. **Notice to quit and petition for restitution need not be signed by landlord in person—Authority of agent to give notice to tenant.**

Code, Art. 53, Sec. 1, provides that when a landlord shall desire to re-possess the demised premises after the expiration of the lease, and shall give notice in writing one month before the expiration of the term to the tenant to remove from the premises at the end of the term, if the tenant shall refuse to comply therewith, then the lessor may make complaint thereof in writing to a Justice of the Peace, who may order restitution and summons, etc. In this case, the notice to quit served on the tenant was signed by the agent of the landlord, who had leased the premises to the tenant, and the petition to the Justice of the Peace for a summons and order of restitution was signed by a lawyer as attorney for the landlord. *Held*, that the statute does not require either of these instruments to be signed by the landlord in person; that the notice to quit and the petition for the order of restitution were both sufficient, and that the Justice of the Peace had jurisdiction of the proceedings. *Benton v. Stokes*, 117.

2. A notice to quit given by a landlord to a tenant is sufficient if it be so certain that the tenant cannot reasonably misunderstand it. An obvious mistake in some part does not invalidate the notice. *Ibid.*
3. When an agent has authority to rent certain premises for the owner it will be presumed that he is authorized to give the tenant notice to quit. *Ibid.*
4. **Enforcement against non-resident of covenant of redemption in lease.**

Specific performance of a covenant relating to the redemption of a ground rent may be decreed against a non-resident owner of the rent after notice by publication, and a trustee may be

LANDLORD AND TENANT—*Continued.*

appointed to execute the conveyance of the rent, under Code, Art. 16, Sec. 117, which provides that when a defendant in a suit in chancery to enforce a contract, etc., relating to property, is a non-resident, notice of such suit may be given by publication in the manner therein prescribed, and a trustee appointed to execute any deed that may be required. *Hol-lander v. Central Metal Co.*, 131.

5. Right of assignee of leasehold to enforce covenant of redemption—Averments of bill—Mesne assignments.

The assignee of an assignee of a leasehold interest is entitled to the benefit of covenants in the lease that run with the land, such as a covenant of redemption. *Ibid.*

6. It is not necessary in a bill by the assignee to enforce such covenant of redemption that the *mesne* assignments from the original lessee to the plaintiff should be set forth. *Ibid.*

7. A covenant in a lease by the lessor to convey the reversion upon the payment of a certain sum to the lessee, his heirs or assigns, is a covenant running with the land, and may be enforced by the assignee of the leasehold estate against an assignee of the reversion. *Ibid.*

8. A lease of land, executed in 1835, contained a covenant on the part of the lessor, his heirs and assigns, that at any time during the continuance of the demise, at the request and cost and charge of the lessee, his heirs or assigns, the lessor, etc., would convey the property in fee simple upon payment of a designated sum. Plaintiff's bill to enforce specific performance of this covenant alleged that he became owner of the leasehold interest by virtue of a certain deed, filed with the bill; that the defendant owned the reversion in the land and was notified by plaintiff of his desire to redeem the rent and that plaintiff had tendered the required sum of money and a deed to be executed conveying the fee. Upon demurrer, *held*, that it was not necessary to set out in the bill all of the assignments of the leasehold interest from the original lessee down to plaintiff, in order to show his right to enforce the covenant; and that the covenant giving the right to redeem to the lessee, his heirs and assigns, enures to the benefit of the plaintiff as the assignee of an assignee. *Ibid.*

9. Counsel fee for examination of title of lessee asking for redemption.

When a lease provides that the lessor shall convey the fee simple

LANDLORD AND TENANT—Continued.

to the lessee or his assigns at their request and cost and charge, the lessor cannot claim a counsel fee for the examination of the title of an assignee of the leasehold in order to ascertain if he is entitled to the benefit of the covenant. *Ibid.*

10. Covenant for redemption in lease for 99 years not against Rule of Perpetuities.

A covenant in a lease for ninety-nine years, renewable forever, that at any time during the continuance of the demise, the lessor, his heirs and assigns, will convey the fee simple title in the land to the lessee or his assigns, upon payment of a designated sum, is not in conflict with the Rule against Perpetuities. *Ibid.*

11. Goods of third party taken under distraint for rent—Right of action of owner against tenant.

When the goods of a stranger found on rented premises are seized and sold under a distraint for rent against the tenant, the owner may buy the goods in at the sale, and recover the amount paid in an action against the tenant. *Swartz v. G.-B.-S. Brewing Co.*, 393.

LICENSES.

See **MUNICIPAL CORPORATIONS**, 5.

MALICIOUS PROSECUTION.**1. Sufficiency of evidence—Probable cause—Malice—Advice of counsel—Embezzlement—Failure to pay over money collected—Evidence.**

In an action of malicious prosecution plaintiff's evidence showed that he was a sales agent of the defendant company and as such had collected for it sums of money, a part of which he did not pay over; that he communicated this fact to an agent of the defendant and said that the amount due would be paid from commissions to be earned by plaintiff, to which the agent did not object, and plaintiff continued to act as sales agent; that afterwards the defendant refused to render plaintiff a statement of the commissions he was entitled to receive; that the defendant caused plaintiff to be arrested and indicted for embezzlement, but did not tell the State's Attorney that plaintiff claimed that the defendant owed him certain commissions, and that the trial of the indictment resulted

MALICIOUS PROSECUTION—*Continued.*

in the acquittal of the plaintiff. *Held*, that this evidence is legally sufficient to entitle plaintiff to recover, if found to be true by the jury, since it tends to show that the plaintiff's failure to pay over all the money collected by him was not with intent to defraud the defendant; that defendant knew that fact, and that plaintiff was not guilty of the crime charged. *Moneyweight Scale Co. v. McCormick*, 170.

2. In such action, evidence is admissible to show the nature and extent of the plaintiff's claim against the defendant and the manner in which the defendant had treated plaintiff's use of money collected by him and not paid over. *Ibid.*
3. In an action of malicious prosecution, while malice may be presumed from the want of probable cause, such presumption may be rebutted by proof of the circumstances under which defendant acted, such as that, after full disclosure of all the facts to counsel, he acted in good faith upon the advice of counsel, and in the honest belief that the accusation made was well founded. *Ibid.*
4. The absence of probable cause cannot be presumed from the fact that the defendant acted maliciously, and the plaintiff is not entitled to recover unless it be shown that the defendant acted without probable cause. *Ibid.*
5. When the evidence in an action of malicious prosecution shows that the prosecution was begun by the express authority of the defendant, and that plaintiff was acquitted, it is proper to instruct the jury that if the arrest and prosecution of the plaintiff was procured under such circumstances as would not have induced a reasonable and dispassionate man to believe that the plaintiff was guilty of the charge against him, then there was no probable cause for the prosecution, and the jury may infer, in the absence of proof to the contrary, that the prosecution was malicious in law, and their verdict may be for the plaintiff. *Ibid.*
6. When the defendant company, at the time of instituting the prosecution of the plaintiff for embezzlement in not paying over money collected by him, did not state to the State's Attorney's office that the plaintiff claimed to be entitled to certain commissions from the defendant, and that defendant had failed to comply with plaintiff's demand for a statement of account, the defendant is not entitled to have the jury in-

MALICIOUS PROSECUTION—Continued.

structed that, if before suing out the warrant for the arrest of the plaintiff, the defendant had placed the entire matter before the State's Attorney's office and was by it advised to swear out the warrant, then the verdict must be for the defendant. *Ibid.*

7. The mere fact that an agent fails to pay over money collected by him does not constitute probable cause for procuring his arrest on the charge of embezzlement. *Ibid.*
8. Whether there was probable cause for the prosecution of a party does not depend upon whether he was guilty or not of the crime charged. *Ibid.*
9. When the defendant caused plaintiff to be arrested for embezzlement, the fact that the defendant charged the money embezzled against the plaintiff as a debt does not negative the existence of probable cause. *Ibid.*
10. The question as to the existence of probable cause for a prosecution depends upon whether or not all of the facts of the case are such as would have justified a cautious man in believing that the accused was guilty. *Ibid.*

MASTER AND SERVANT.**1. Action against master for assault by servant.**

When the rules of a laundry company provide that its drivers shall collect the money due for goods upon delivery of the same, and that if goods are delivered without payment, they shall be responsible therefor to the company, a driver who delivers goods without payment, and subsequently calls to collect the money due therefor, is not acting within the scope of his employment, and the company is not liable for an assault then committed by him. *Stienman v. Laundry Co.*, 62.

2. Ratification.

When the driver commits an assault under such circumstances, the laundry company is not to be held to have ratified his act merely because it offered to return the goods then taken by him. *Ibid.*

3. Assumption of risks by servant.

A servant assumes the risk of dangers incident to the service which cannot be avoided by the exercise of ordinary care on the part of his employer, but he does not assume the risks

MASTER AND SERVANT—Continued.

incident to the work as conducted in accordance with the individual methods of the employer, if these methods are negligent. *M., D. & V. R. Co. v. Brown*, 304.

4. Falling into vat of boiling molasses.

In defendant's vinegar factory, there was a molasses room, 40 ft. by 27 ft., where molasses was boiled in a vat, 6 ft. in diameter and 3½ ft. deep, the top of which was flush with the floor of the room, and no guard rails were around it. When molasses was being boiled, the steam arising obscured to some extent the view in the room. Plaintiff's deceased was employed as a laborer in another part of the factory, and none of his duties required him to enter the molasses room, and although he had on some occasions passed through it in going to other parts of the factory, it was not necessary for him to do so. In some way not explained, he fell into the vat of boiling molasses one morning, and suffered injuries which caused his death. In an action to recover damages therefor, *held*, that since there is no evidence of defendant's negligence in failing to provide a safe place for the deceased to work in, as he was not employed to work in the molasses room, and since he had knowledge of the unguarded position of the vat into which he fell, and the danger was not hidden, and he voluntarily exposed himself to it, there can be no recovery in this case. *Linton v. Balto. Mfg. Co.*, 404.

5. Duty of master to keep machinery in repair—Injury to operator on die press—Sufficiency of evidence.

It is the duty of an employer to use due care to furnish reasonably safe machinery in the first place, as well as afterwards to keep it in repair. *Wolf v. Shriver*, 295.

6. In an action by an employee to recover damages for an injury alleged to have been caused by a defective machine, prayers are erroneous which instruct the jury to find for the defendant if they believe certain facts therein stated, when such prayers assume that the machine which injured the plaintiff was a reasonably safe one, and do not leave the finding of that fact to the jury. *Ibid.*

7. It is the duty of an employer who has in use machines likely to cause injury to operators, if out of repair, to have them examined and repaired by a competent machinist or mechanic, when informed that they fail to work properly. *Ibid.*

MASTER AND SERVANT—Continued.

8. Plaintiff informed defendant's foreman that the die press upon which she was working was out of order. The foreman oiled it and told plaintiff that it was all right. Soon afterwards, she was injured by an alleged defect in the machine. This foreman was not a mechanic, nor was he competent to make repairs on machines out of order. Under these circumstances, the plaintiff is not precluded from recovering damages for the injury on the ground of a lack of evidence to show that the foreman was incompetent or that the defendant had failed to exercise due care in his selection. *Ibid.*
9. Plaintiff, a young woman, was put to work on a die press in defendant's factory, which was used to cut out labels. A carriage or platen was raised in a perpendicular frame by a lever on the press, and when held up, the operator withdrew the die and paper and put in a new supply. Plaintiff's evidence was that on the occasion of the injury, although she had shut off the power in the usual way, the platen fell without warning, while she was removing the die, and cut off two of her fingers; that shortly before the accident, she had told the foreman that the machine was out of order, and he had oiled it and told her it was all right; that on another occasion, she had complained of the machine to one of the defendants who had promised to have it fixed; also that the clutch which held up the platen was worn and sometimes allowed it to slip down unexpectedly. *Held*, that this evidence, if believed by a jury, was legally sufficient to entitle the plaintiff to recover. *Ibid.*
10. *Held*, further that the evidence of contributory negligence on the part of the plaintiff is not such as to bar her right to recover. *Ibid.*
11. **Injury to employee by collision with runaway engine—Defect in engine—Instructions.**

One of the counts of the declaration in this case charged that the defendant company was negligent in failing to provide reasonably safe equipment for the performance of work by its employees, and another count that the defendant had failed to exercise due care in the inspection of the equipment. The plaintiff's evidence at the trial tended to show that a locomotive engine, at the time it was bought by the defendant, was an old one; that subsequently it was in bad condi-

MASTER AND SERVANT—Continued.

tion; that its throttle bar would work open; that this defect existed a month before the accident in question; that the engine was left standing alone on a side track with steam up and, escaping, caused injury to the plaintiff. *Held*, that defendant's prayers instructing the jury that under the pleadings and evidence, the plaintiff was not entitled to recover were properly refused, since there was evidence that the defective condition of the engine could have been discovered by inspection, and also that due care had not been exercised in its original selection. *M., D. & V. R. Co. v. Brown*, 304.

12. *Held*, further that defendant's prayers asserting that the engine was in good condition when placed on the side track, and that there was no evidence to show that it was defective, were erroneous, as was also a prayer which ignored defendant's non-delegable duty to provide safe equipment. *Ibid*.
13. *Held*, further that a prayer which denied the right of the plaintiff to recover if he continued in the service of the defendant, after knowledge of the defect in the engine, was properly rejected, since the plaintiff was justified in assuming that such a patent defect as that which the evidence showed to exist in the engine, would be discovered under any reasonable system of inspection, and would be promptly remedied. *Ibid*.

MERGER.**1. Conveyance to mortgagee.**

The conveyance of the equity of redemption to a mortgagee does not necessarily operate to merge and extinguish the mortgage. Whether it has that effect or not depends upon the intention of the mortgagee. *Felgner's Admrs. v. Slingluff*, 474.

MILK.

See **CRIMINAL LAW**, 1.

MORTGAGES.**1. Conveyance of equity of redemption to mortgagee.**

A conveyance of the equity of redemption to a mortgagee, after his assignment of the mortgage for the purpose of foreclosure, does not create a merger. *Felgner's Admrs. v. Slingluff*, 474.

MORTGAGES—Continued.**2. What title passes under sale.**

A sale under the power contained in a mortgage passes the title which the mortgagor had at the time the mortgage was recorded and not merely the title he had at the time of the sale. *Ibid.*

3. Sale is res judicata—Collateral attack.

The principle of *res adjudicata* applies to a mortgage foreclosure sale, and its validity cannot be attacked collaterally. *Ibid.*

4. If the mortgagee was not authorized for some extrinsic reason to make the sale, it should be set aside by a bill of review or other proceeding. *Ibid.***5. Agreement that mortgagor shall have surplus of proceeds of sale of property—Bill for accounting—Evidence—Allowances—Costs—Interest.**

The evidence in this case is held to establish the following facts:

That the plaintiff and her husband executed a mortgage upon a tract of land to the defendant to secure the payment of a certain sum of money, and also assigned the proceeds of a life insurance policy in part payment, under an agreement that the property should be sold at private sale or otherwise, that meanwhile the mortgagee should be entitled to the rents, and that any surplus over and above the amount of the mortgage debt arising from the proceeds of sale, the rents and the policy of insurance, should be paid over to the plaintiff. Afterwards, in order to avoid a foreclosure, plaintiff executed a deed to the defendant conveying the equity of redemption, which deed defendant did not place on record, but of this fact plaintiff was ignorant. The property was, however, sold under a power in the mortgage and conveyed to the defendant, the mortgagee, his object in making the sale being to acquire an unquestionable title, but the plaintiff had no actual knowledge of this mortgage sale. After that, plaintiff occupied the property for a time and endeavored to sell the same. *Held*, that the title acquired by the defendant under the foreclosure sale was not intended to, and did not, destroy the rights of the plaintiff under the agreement relating to the surplus of the proceeds of sale. *Felgner's Admrs. v. Slingluff*, 474.

6. *Held*, further that the ratification of the mortgage sale does not preclude the plaintiff from asserting under these circum-

MORTGAGES—*Continued.*

stances her rights to the surplus arising from a private sale of the property afterwards made by the defendant over and above the amount of the mortgage. *Ibid.*

7. The defendant, after the above-mentioned mortgage sale, sold the property at private sale to different parties for a sum in excess of the mortgage debt, and plaintiff's bill in this case asked for a decree for the excess of the receipts of the defendant from the property in pursuance of said agreement. *Held*, that the plaintiff is not to be charged with the costs of the foreclosure proceedings, since the same were not necessary to vest the fee simple title in the defendant, and because those proceedings were had without notice to the plaintiff. *Ibid.*

8. *Held*, further, that certain rents received from the property had not been paid to the defendant on account of the mortgage debt and should not be deducted from the amount of the same. *Ibid.*

9. *Held*, further, that since the defendant only demanded four per cent. interest on the deferred payments of the purchase money of the property sold by him, the plaintiff should not be charged with six per cent. *Ibid.*

10. *Held*, further that the plaintiff is not to be charged with interest on the notes given for interest on the mortgage debt after their maturity, the intention of the parties being to the contrary. *Ibid.*

11. *Held*, further, that the defendant is entitled to a certain allowance for taxes, insurance, advertisement and other expenses, as set forth in the opinion in this case, and should be charged with interest on the life insurance policy which he failed to collect for some months, although it was collectible. *Ibid.*

12. *Held*, further, that interest on the balance found to be due to the plaintiff should be allowed from the time defendant made a statement of the account after the private sale of the property by him. *Ibid.*

13. Description of property mortgaged.

A mortgage which conveys all the property which the mortgagor owns or holds any interest in, and all his right, title, interest and estate in a tract of land, is sufficient to convey the fee simple interest which the mortgagor had in the land

MORTGAGES—Continued.

by virtue of the Rule in *Shelley's Case*. *Cook v. Councilman*, 622.

14. When costs of vacated sale allowed out of proceeds of second sale.

When a mortgage sale made by a trustee is set aside, and the trustee has not been guilty of any bad faith or misconduct, the expenses of that sale will be allowed out of the proceeds of a subsequent sale. *Griffith v. Dale*, 697.

15. No allowance of counsel and witness fees.

When a mortgage sale is set aside upon exceptions filed thereto and another sale ordered, the trustee is not entitled to an allowance out of the proceeds of the second sale for counsel fees paid to a lawyer to oppose the exceptions to the ratification of the first sale. *Ibid.*

16. Nor is the trustee in such case entitled to an allowance for a fee paid to a witness called to testify as a real estate expert in opposition to said exceptions. *Ibid.***17. Allowance to trustee for insurance premium.**

A mortgagee, who has insured the property against fire upon breach of the mortgagor's covenant to do so, is entitled to a *pro rata* allowance therefor from the time the insurance was effected to the day of sale, after which time the policy enured to the benefit of the mortgagee, who was the purchaser. *Ibid.*

18. Charges against mortgagee.

Exceptions to the ratification of a mortgage sale at which the first mortgagee was the purchaser were filed by a junior mortgagee, and after testimony was taken the sale was set aside. Upon the distribution of the proceeds of a second sale, *held*, that a part of the charges of a stenographer for taking testimony under the exceptions to the first sale was properly charged against the first mortgagee. *Ibid.*

19. When trustee entitled to commissions on rents collected before sale.

When a trustee appointed to make a mortgage sale upon default takes possession of the property and collects the rents thereof, without an order of Court directing him so to do, and the rents are not paid to the mortgagee, but are brought into Court for distribution in the final audit after the sale, the trustee is entitled to commissions thereon, since the collection

MORTGAGES—Continued.

was for the benefit of all of the parties and would have been authorized by the Court upon application. *Ibid.*

MUNICIPAL CORPORATIONS.

1. Validity of ordinance of Baltimore City imposing a tax upon Dealers in the wholesale produce market—Time of payment of licenses in Baltimore City.

An ordinance of Baltimore City established a wholesale produce market and provided as follows in one of its sections: "All dealers and commission men shall pay in advance two hundred dollars per annum for the use and privilege of selling in this market. Wholesaling in the public streets is unlawful." The City Charter, Sec. 6, confers on the Mayor and City Council full power and authority "to license, tax and regulate all businesses, trades, avocations or professions;" and also to license and regulate the sale of fresh fruits, meats, vegetables and all other perishable articles. *Held*, that under the charter, the City had the right to impose this tax for revenue upon dealers selling in the produce market. *Meushaw v. State*, 84.

2. *Held*, further, that the tax is not unreasonable in amount in view of the privileges granted and of the cost of erecting and maintaining the market. *Ibid.*
3. Every fair intendment should be made in favor of the reasonableness of a license tax imposed by a municipal corporation acting within the scope of its authority. *Ibid.*
4. The ordinance of Baltimore City providing that persons selling in the wholesale produce market should pay two hundred dollars per annum in advance for the privilege of so doing was approved May 20th, 1907. One section of the ordinance provided that licenses for selling shall begin on May 1st of each year and must be paid by May 10th of each year. The appellant was indicted for selling at wholesale in said market in June, 1907, without a license. *Held*, that the appellant was not entitled to sell in said market during the year 1907 without paying the tax imposed by the ordinance. *Ibid.*
5. The provision in sec. 59 of the Baltimore City Charter, that "all licenses imposed by ordinance shall be due and collectible in the first week in January in each year," does not apply to the revenue tax imposed by the Ordinance of 1907 upon persons selling in the wholesale produce market. *Ibid.*

MUNICIPAL CORPORATIONS.—Continued.**6. Right of municipality to rent property not needed for public use—Use of rented municipal property in competition with business of taxpayer.**

When a municipality owns real property not needed for public use, it is not obliged to keep the same unoccupied, but may rent it temporarily to private persons. The fact that a lessee uses such property in competition with the business of a taxpayer, does not entitle the latter to an injunction, when the renting is not *ultra vires*. *Gottlieb-Knabe Co. v. Macklin*, 429.

7. The Mayor and City Council of Baltimore rented an unused building owned by it to the Field Officers of a regiment of State Militia for use as an armory for a definite term. These officers, with the consent of the municipality, sublet the building from time to time to private persons for concerts and other meetings. The proceeds from these lettings were divided between the municipality and the regiment. The charter of the city authorizes it to hold and dispose of property, and to rent for limited terms, any of its property not needed for public purposes. Plaintiffs' bill in this case alleged that they are the owners of halls, used for concerts and public meetings; that the renting of the armory by the Field Officers for such purposes deprived plaintiffs of the opportunity to rent their buildings for those purposes, and that such use of the municipal property was unlawful, and the bill prayed for an injunction. *Held*, that the city has the power under its charter to rent the building to the Field Officers, since it was not needed for municipal purposes; that the letting of it for entertainments was a renting for a definite term within the meaning of the charter, and that the Field Officers as lessees had the right to sublet the building for these purposes. *Ibid*.
8. *Held*, further that such use of the armory in competition with the business of plaintiff does not deprive them of their property without due process of law. *Ibid*.

NEGLIGENCE.**1. Fire caused by sparks from dinkey engine—Evidence—Instructions to jury.**

The defendants, in the course of doing of certain railroad construction work, laid a track within a few feet of plaintiff's

NEGLIGENCE—*Continued.*

ice house and outbuildings, and operated on the track certain dinkey engines and dirt cars. The declaration alleged that these engines were not supplied with spark arrestors or netting; that they were negligently operated, and that plaintiff's house was set on fire and destroyed by sparks thrown out by one of the engines. Upon the trial of the action, *held*, that evidence is admissible to show that the dinkey engines had thrown out sparks shortly before the fire broke out in plaintiff's house, and that these sparks had set fire to combustible material near the track. *Sims v. American Ice Co.*, 68.

2. *Held*, further, that evidence that engines of a railroad company, operated in the county, had been seen to throw out sparks is not admissible, because that fact is in no way connected with the fire in question. *Ibid.*
3. When the defendant in an action to recover damages for a fire alleged to have been caused by sparks from his engine, offers evidence to show that an engine of a railroad company had thrown out sparks sufficient to have caused the fire, and about the same time, the plaintiff is entitled to offer evidence in rebuttal showing that the fire was not caused by the engine of the railroad company. *Ibid.*
4. In an action where the evidence showed that the defendant operated dinkey engines within a few feet of plaintiff's house; that these engines had no spark arrestors in them, and no netting in the smoke boxes, and that they constantly threw out quantities of sparks near plaintiff's house, the jury was instructed, at the instance of the plaintiff, that if they find that the plaintiff's house was destroyed by fire communicated from the defendant's engines and that the defendant did not exercise reasonable care to avoid, as far as practicable, injury to property along the line of the road upon which his engines were operated, by having said engines properly constructed and in good condition, then their verdict must be for the plaintiff. The jury was also instructed at the instance of the defendant that it was necessary for the plaintiff to prove by a preponderance of testimony, first, that the locomotive of the defendant emitted the sparks that set fire to plaintiff's house, and second, that the defendant was guilty of negligence in the management of the engine that emitted the sparks that set fire to the house. *Held*, that under these pray-

NEGLIGENCE—Continued.

ers, the jury was properly instructed as to the law of the case. *Ibid.*

5. Injury to lineman from uninsulated electric wire—Evidence as to replacing insulation.

Plaintiff's deceased while at work on a telegraph pole was killed by contact with an electric wire of the defendant company from which the insulation had been removed. It was shown that the insulation had not been worn off by time or exposure, but had been clearly cut on that and adjacent wires, and also that electric companies test their high current wires from time to time, and that in so doing it is necessary to bare the wire at the point of testing. *Held*, that evidence is admissible to show that the wire with which the deceased came in contact and the adjacent wires were re-covered or re-taped by the defendant after the accident. Such evidence is not in conflict with the rule excluding evidence of repairs made after the happening of the injury. *Consol. Gas Co. v. Smith*, 186.

6. Evidence as to use of rubber gloves.

If persons engaged in a particular business habitually act in a certain way without injurious results, that is evidence to show that one who acted in that way at the time of suffering an injury was not negligent. Consequently, in an action to recover damages for the death of a lineman of a telegraph company caused by his touching the defectively insulated wire of an electric company, strung on the same pole as the wires of the telegraph company, evidence is admissible to show that it was not customary for the linemen of the telegraph company to wear rubber gloves while stringing wires on poles, except in rainy weather. *Ibid.*

7. Death caused by electric wire—Sufficiency of evidence of negligence—Questions for the jury.

A lineman of a telegraph company while at work stringing a wire on a pole, used also by an electric company, was killed by contact with a defectively insulated electric wire. In an action to recover damages for his death, the questions whether he was guilty of contributory negligence in not seeing the defect in the insulation, or in not using rubber gloves, or in his manner of work, are properly left to the jury where there is no evidence that the bare place on the wire could have been seen from the ground, and there is evidence that it

NEGLIGENCE—*Continued.*

could not have been seen from his position after climbing to his place of work on the pole, and evidence that under the conditions existing at the time of the accident, it was not customary for telegraph linemen to wear rubber gloves, and also evidence that the method used by the deceased to string the wire was the one usually employed for that purpose. *Ibid.*

8. If it be shown that the insulation on defendant's electric wire was cut away at the point where the injury was caused, and that such condition existed two weeks before the happening of the injury, that is legally sufficient evidence of defendant's negligence to go to the jury, for if the cutting was not done by the defendant for the purpose of testing the wire, but by third parties, the lapse of time was sufficient to give constructive notice to the defendant of the condition of the wire. *Ibid.*

9. **Scintilla of evidence.**

When the evidence of defendant's negligence is sufficient to be submitted to the finding of the jury, it is not proper to instruct them that a mere scintilla of evidence to show defendant's failure to use due care is not sufficient to justify a verdict for the plaintiff. The Court cannot submit the case to the jury unless there is more than a scintilla of such evidence, and consequently, when the case is submitted, it cannot tell the jury to find for the defendant if there is only a scintilla. *Ibid.*

10. **Custody of live engine standing on track.**

When a locomotive engine which had been left standing alone with steam up on a track, escapes and causes injury, it is ordinarily a question for the jury to determine whether the railroad company had exercised due care in the custody of the engine. *M., D. & V. R. Co. v. Brown*, 304.

11. It is the duty of a railroad company to adopt and enforce reasonable rules for the inspection of its engines and for their safe custody while left under steam on a side track. *Ibid.*

12. **Injury from falling of trolley wire in street.**

Plaintiff's evidence was that while walking in the street on which defendant's electric railway ran, the trolley of a car came off, and kept bumping against the span wires stretched across the street to hold up the trolley wire; that thereby a span wire was detached from its fastening to the pole, fell

NEGLIGENCE—*Continued.*

over the trolley wire, thus becoming charged with electricity; that there was a flash from the wire in plaintiff's face, and that she became unconscious and would have fallen but for help; that afterwards plaintiff developed certain symptoms of injury. It was shown that plaintiff might have received an electric shock through her clothing which would not have left a mark on her body. Defendant's evidence was to the effect that the wire did not touch plaintiff. *Held*, that the evidence is legally sufficient to show that either the plaintiff's person or clothing was touched by the wire, and to take the case to the jury. *United Rys. Co. v. Corbin*, 442.

13. *Held*, further, that if the bumping of the trolley wire against the span wire caused the latter to be torn from the pole, that is some evidence that it was not properly fastened.

14. *Held*, further, that if the hysterical condition of the plaintiff was not caused by the accident there is evidence in the case that other injuries were caused by it for which she is entitled to recover. *Ibid.*

15. Instruction.

In an action to recover damages for an injury alleged to have been caused by defendant's negligence, a prayer is erroneous which instructs the jury that if they believe the accident happened as described by the witness, G. P., then the verdict must be for the defendant. *Ibid.*

16. Fall of electric wire in street *prima facie* evidence of negligence.

The fact that a wire of an electric lighting company, strung over a public street of a city, falls upon, and injures, a person passing along the street, is itself sufficient *prima facie* evidence of negligence on the part of the company and casts upon it the burden of overcoming that presumption. *Walter v. Balto. Electric Co.*, 513.

17. Injury from electric wire strung on bridge—Evidence—Instructions to the jury—Walking on driveway.

When it is alleged that a person was injured by the defective condition of an electric light wire at a certain time and place, evidence is not admissible to show the condition of the wire at that place on the following day. *Annapolis Gas Co. v. Fredericks*, 595.

18. Defendant's electric wire was strung along the side of a pub-

NEGLIGENCE—*Continued.*

lic bridge and over the water, at a distance of nine feet five inches from the floor of the bridge. Plaintiff's evidence was that while he was standing on that side of the bridge by the rail, the footway being on the other side, his hat was blown off and in reaching for it he touched the live electric wire. In an action against the electric company, *held*, that a prayer offered by the plaintiff is erroneous which does not require the jury to find whether the wire was sagging at the time and place of the accident, so as to be dangerous to persons using the bridge with due care, and that the defendant knew, or, by the exercise of ordinary diligence, could have known, that the wire was so sagging, and that the wire was originally constructed in a proper manner at the place. *Ibid.*

19. *Held*, further, that the plaintiff was not guilty of contributory negligence as matter of law. *Ibid.*

20. In an action to recover damages for an injury caused by an electric wire, a prayer which states in abstract terms the duty of persons using dangerous agencies on a highway, without making any reference to the particular facts in evidence, is held in this case to be general and misleading. *Ibid.*

21. A pedestrian who uses the driveway of a bridge instead of the footway is not a trespasser. *Ibid.*

22. **Wagon standing near car track—Person on footboard of street car struck by swinging open of gate of wagon.**

It is the duty of a person in charge of a wagon standing near a street-car track so to place and manage it, as far as practicable, as not to expose the persons on a passing car to the danger of collision. *Monumental Brewing Co. v. Larrimore*, 682.

23. Plaintiff, a conductor of a street railway company, was standing on the footboard of an open car, going at half speed, when it approached a large beer wagon which was standing alongside of the track, the outside of the hub being from two and a half to three feet from the track. The plaintiff's evidence was that as the car was passing the wagon its end gate or door was swung open and struck the plaintiff before he could get out of the way. In an action against the owner of the wagon, the defendant's evidence was that the gate was open before the car approached, and that neither its position nor that of the wagon was afterwards changed. *Held*, that since it was the duty of the defendant so to place its wagon and so

NEGLIGENCE—*Continued.*

to fasten the gate or end piece that persons on a passing car would not be injured by the swinging open of the gate, and since if the driver did not himself open the gate he permitted it to be opened, the evidence of the defendant's negligence is legally sufficient to go to the jury. *Ibid.*

24. *Held*, further, that a prayer offered by the defendant is erroneous which denies the right of the plaintiff to recover if the defendant's servants believed, in the exercise of reasonable care, that the wagon was stopped at a safe distance from the track, so that the gate would not come in contact with anyone on the footboard, and the conductor and motorman thought the same thing. The question is not whether the defendant's servants believed that they had acted with due care, but whether in fact they had done so. *Ibid.*

25. *Held*, further, that another prayer offered by the defendant is erroneous which denies the right to recover if the wagon was standing with its gate open at a safe distance from the track and the injury to the plaintiff occurred by the suction of the passing car drawing the gate towards it. There is no evidence in the case as to the conjectured suction; and the prayer is also bad in assuming that the wagon was at a safe distance from the track if the suction of a passing car could draw further open the gate. *Ibid.*

See CARRIERS, 9.

MASTER AND SERVANT.

PHYSICIANS AND SURGEONS.

NOTICE.

See EQUITY, 3.

LANDLORD AND TENANT, 1.

PARTNERSHIP.

See ACTION OR SUIT, 3.

PERPETUITIES.

See LANDLORD AND TENANT, 10.

PHOTOGRAPHS.

See EVIDENCE, 25.

PHYSICIANS AND SURGEONS.

1. Action for negligence in diagnosis and treatment—Instructions.

Plaintiff, a woman sixty-one years old, fell and fractured a femur in November. The defendant, her family physician, was called in to treat her, and she was subsequently taken to his sanatorium. No operation on the broken hip was performed or directed by him, but plaintiff's leg was merely kept in position by sand bags and afterwards by a plaster cast and extension. She left defendant's sanatorium in the following February in a lame condition. Two weeks afterwards, she called in a surgeon who performed an operation, removing the broken end of the femur and making a new thigh joint which gave her the use of the injured leg. In an action to recover damages for the defendant's alleged negligence in his treatment of the plaintiff, defendant's evidence was to the effect that the plaintiff was at the time of the accident, and afterwards, suffering from tuberculosis; that her temperature rose to a dangerous point, and that it was not the proper treatment to perform a surgical operation on her at that time. *Held*, that an instruction authorizing a verdict for the plaintiff if the jury found that certain specified mistakes were made by the defendant in his diagnosis of plaintiff's case, and that there was a failure by him to exercise ordinary care and skill in specified respects in his treatment, is erroneous, because it is silent as to the evidence concerning the tuberculous condition of the plaintiff, and therefore withdrew from their consideration that evidence. *Miller v. Leib*, 414.

2. *Held*, further, that a prayer instructing the jury that the plaintiff was entitled to recover if the defendant did not exercise reasonable care and skill in ascertaining the nature of her injury and in his treatment was not erroneous, when granted in connection with another prayer instructing the jury not to allow damages for such delay in defendant's treatment of plaintiff's hip as resulted from his diagnosis that she was suffering from tuberculosis. *Ibid*.

PLEADING.

1. Effect of plea of tender and payment into Court.

When in an action on a contract—in this case on a fire insurance policy—the defendant files a plea of tender and pays into Court the sum of money tendered, he is estopped after-

PLEADING—Continued.

wards to allege that nothing was due to the plaintiff under the contract, and such tender operates as an admission that the amount paid into Court was due. *Palatine Ins. Co. v. O'Brien*, 100.

POWERS.

See DEVISE AND LEGACY, 5.

PRACTICE:**1. Instructions as to indebtedness.**

Defendant had been the manager of a corporation which made an assignment for the benefit of its creditors to the plaintiff. Defendant was indebted to the corporation on certain transactions, but claimed that he had rendered extra services to it upon the promise of the directors to pay for the same, which they had failed to do. *Held*, that a prayer offered by the plaintiff in an action to recover the amount of the defendant's indebtedness to the corporation should state what facts should be found in order to create the indebtedness. *Richardson v. Anderson*, 641.

2. *Held*, further, that a prayer offered by the defendant setting forth the rendition of services by him to the corporation and its agreement to pay therefor a reasonable compensation in addition to his salary, and declaring that if such fact be found by the jury, then the defendant is entitled to such sum as they may find to be a reasonable compensation, should not be modified by adding thereto, "unless the jury find that the defendant before the institution of the suit, waived or abandoned all claim for such compensation"—since there is no evidence in the case of a waiver. *Ibid*.

3. Reference in prayer to pleadings.

A prayer will not be held to refer to the pleadings when it merely asserts that under the proceedings in the case the evidence is legally insufficient. *Monumental Brewing Co. v. Larrimore*, 682.

4. Prayer as to scintilla of evidence.

When the evidence of defendant's negligence is sufficient to be submitted to the finding of the jury, it is not proper to instruct them that a mere scintilla of evidence to show defendant's failure to use due care is not sufficient to justify a verdict for

PRACTICE—Continued.

the plaintiff. The Court cannot submit the case to the jury unless there is more than a scintilla of such evidence, and consequently, when the case is submitted, it cannot tell the jury to find for the defendant if there is only a scintilla. *Consol. Gas Co. v. Smith*, 186.

PRINCIPAL AND SURETY.**1. Subrogation—Acceptance of third party's obligation in satisfaction of debt.**

Seven persons agreed among themselves to buy certain parcels of land from an Improvement Company, and, in accordance with their agreement, the property was conveyed to one of them, A., individually, who executed to the Improvement Company, his personal bonds for the deferred payments. He also signed a declaration of trust setting forth the real interest of the parties in the property. Each one of the purchasers paid his one-seventh of the first two instalments of the purchase money to A., who paid it over to the company. No other payments were made and upon the insolvency of the company, its receiver filed the bill in this case to enforce payment of the balance of the purchase money from said persons, other than A., alleging that defendants were each bound to pay one-seventh thereof to A. and that the plaintiff, as a creditor of A., is entitled to be subrogated to his claim against the defendants. *Held*, that A. was not a surety for the defendants, who were not directly indebted to the company, and A. had not paid any money for them, and that the Receiver is not entitled to maintain the bill. *Downing v. Robinson*, 35.

2. *Held*, further, that if the liability of the defendants to the company was not extinguished by its acceptance of A.'s individual bonds for their debt, it is barred by the Statute of Limitations. *Ibid*.

RAILROAD COMPANIES.

See CARRIERS.

HIGHWAYS AND STREETS, 4.

MASTER AND SERVANT, 11.

NEGLIGENCE.

REDEMPTION OF LEASES.

See LANDLORD AND TENANT, 4, 5.

RELIGIOUS SOCIETIES.

1. Separation into different organizations—Title to property.

At a time when a religious society had under its charge two churches and affiliated with it two corporations, one for the relief of the poor, and the other the A. Sunday-School Society, a will was probated by which sums of money were bequeathed to these two corporations, subject to a life estate. Before the legacies became payable, the two churches were separated and made independent by competent ecclesiastical authority, and a resolution of the members directed that the property of the parent society, and legacies to be received, should be divided between the separated churches. Subsequently the said legacies were paid to the corporations named in the will, both of which were connected with one of said churches, and the bill in this case, filed by the other church and its societies, asked for a division of the legacies. *Held*, that the resolution adopted by the members of the religious society at the time of its separation is of no effect as to this property, because it was not the action of the directors of the corporations, legatees. *Trustees Eutaw St. M. E. Church v. Asbury S. S. Society*, 670.

2. *Held*, further, that the Society for the Relief of the Poor was not an integral part of the organization of the church and that the corporation named in the will is entitled to the whole of the legacy paid to it. *Ibid*.
3. *Held*, further, that since the A. Sunday-School Society was an integral part of the church organization which was divided, one-half of the legacy paid to it should now be transferred to the Sunday-School Society of the other church, as the legacy was intended to be for the benefit of the Sunday-schools of both churches. *Ibid*.

RES JUDICATA.

See MORTGAGES, 3.

ROADS.

See HIGHWAYS AND STREETS.

RULE IN SHELLEY'S CASE.

See DEVISE AND LEGACY, 4.

SET-OFF.**1. Effect of plea.**

When the defendant files the general issue pleas to the declaration, an additional plea of set-off is not an admission of the correctness of plaintiff's account. *Oliver & Burr v. Noel Co.*, 465.

2. What claims may be set off against debt sued for by trustee in assignment for benefit of creditors.

A person indebted to one who makes an assignment for the benefit of creditors cannot set off against his debt when sued by the trustee under the assignment claims against the assignor purchased by him after the execution of the assignment. *Richardson v. Anderson*, 641.

3. The trustee under an assignment for the benefit of creditors takes the property and rights of the assignor subject only to the equities which exist against the same at the time of the assignment. Consequently, when the assignment includes a claim against A. then due, A. cannot set off against that claim a debt of the assignor to him which did not become due until after the assignment. *Ibid.*

4. A person who endorsed a promissory note for the accommodation of a party afterwards making an assignment for the benefit of creditors and who is called upon to pay the note after the institution of suit against him by the trustee under the assignment to recover a debt due by him to the assignor when the assignment was made is not entitled to set off against his debt the payment so made by him as accommodation endorser. *Ibid.*

5. Set-off not specially pleaded.

While a set-off must be specially pleaded and evidence in support of it is not admissible unless so pleaded, yet, when such evidence has been produced without objection, and the prayers do not confine the right to recover to the pleadings and evidence, the jury may find the existence of a set-off in favor of the defendant. *Richardson v. Anderson*, 641.

SPECIFIC PERFORMANCE.**1. Restrictions as to use of land not known to purchaser.**

When a vendor of land does not inform the purchaser that there are restrictions relating to the character of buildings that may be erected upon it, and their location, which may

SPECIFIC PERFORMANCE—*Continued.*

affect its market value, and the purchaser is not aware of the existence of such restrictions, specific performance of a contract to purchase the land will be refused. *Shea v. Evans*, 229.

See LANDLORD AND TENANT, 4.

STATUTES.

1. Repeal of private act by general law.

A prior special or private Act of the Legislature is not repealed by a subsequent general Act, unless there be an express reference to that previous Act or a necessary inconsistency between the two. *Anne Arundel County v. United Rys. Co.*, 377.

See TABLE OF STATUTES IN FIRST PART OF VOLUME.

STOCKBROKER.

See BROKERS, 1.

CONTRACTS, 1, 4.

SUBROGATION.

See PRINCIPAL AND SURETY, 1.

TAXATION.

1. Taxation in annexed territory of Baltimore City—Turnpike road as a boundary.

Under the Act of 1902, Chapter 130, relating to the taxation of landed property situated in the territory annexed to Baltimore City in 1888, the full city rate of taxation cannot be imposed until the land is formed into blocks of ground bounded on all sides by intersecting streets, opened, graded and paved from curb to curb, and until there shall be upon every such block of ground at least six houses. *Held*, that a turnpike road used and graded as a street may be treated as one of the boundaries under said Act. *Coulston v. Baltimore City*, 271.

2. *Held*, further, upon the facts of the case, that a certain street was improved by pavement within the meaning of the Act. *Ibid*.

3. Tax sales—Title of purchaser *prima facie* valid—Preliminary notice of sale.

The purchaser at a tax sale, which was made in compliance with

TAXATION—*Continued.*

the statute, has a new and complete title to the land and all prior encumbrances and titles of private persons are extinguished by the sale. *McMahon v. Crean*, 652.

4. Since the enactment of Code, Art. 81, sec. 53 (Act of 1872, ch. 384), it is not necessary for the purchaser at a tax sale to show affirmatively that all the proceedings under which the sale was made were regular. Under that statute, when the Court ratifies and confirms a tax sale reported to it by the Collector of Taxes, the purchaser acquires a good *prima facie* title, and the burden of proof to show that the proceedings were irregular is thrown upon the person attacking the sale. *Ibid.*

5. The local law of Baltimore (City Code, 1879), Art. 47, sec. 44, provided that no sale should be made by the Collector for non-payment of taxes until he has first given notice to the person in arrear, or left at his residence, a statement of the indebtedness and not less than thirty days' notice of his intention, if the bill be not paid, to enforce payment thereof. In this case the Collector's report of the tax sale stated that he had given notice to the delinquent owner that if the bill rendered be not paid within thirty days it would be *subject to distraint or execution*. But the tax bills filed as exhibits with the report of sale showed that they contained a notice in red ink to the effect that if not paid within the time limited, payment thereof *will be enforced by distraint or execution*, and these were copies of the bills as rendered. *Held*, that this preliminary notice of the sale actually given was in compliance with the statute. *Ibid.*

6. **Place of making tax sale under former statute.**

In 1879, when the tax sale in this case was made, the general law (Code of 1860, Art. 81, sec. 50; Rev. Code of 1878, Art. 11, sec. 49) provided that tax sales should be made on the premises or at the Courthouse door. The Act of 1878, ch. 227, relating to such sales in Baltimore City, contained no direction as to the place where the sale should be made. *Held*, that the general law, being in conflict with the local, did not control in this respect in said city; that under the local law the place of the sale was left to the discretion of the City Collector, and that a sale made by him at the Exchange Sales

TAXATION—Continued.

Rooms, where it was customary to make such sales, after due notice by advertisement, was valid. *McMahon v. Crean*, 652.

7. Statute validating deeds by tax collectors.

A collector of taxes executed a deed to the purchaser for the property sold for taxes by his predecessor in office, whereas such deed should have been executed by the collector who made the sale. Afterwards the Act of 1904, ch. 281, provided that whenever any property in Baltimore City has been sold for taxes by one City Collector, but the deed therefor executed by his successor in office, such conveyance shall be as valid as it would have been if made by the collector who made and reported the sale. *Held*, that this Act is a proper exercise of the legislative power and does not violate any right of the owner of the property so sold. *Ibid*.

See MUNICIPAL CORPORATIONS, 1.

TENDER.

See INSURANCE, 6.

PLEADING, 1.

TRIAL.

See PRACTICE.

TROVER.**1. Action by owner of goods taken for rent due by defendant—
Measure of damages.**

Certain property belonging to the plaintiff, and also property to which he was entitled under a chattel mortgage, was in the possession of a man who was a sub-tenant of the defendant, when this sub-tenant left the premises on which said property was and gave the keys to the defendant. After the plaintiff had demanded possession of the property and defendant had refused to give him the keys, the landlord issued a distress for rent against the defendant, under which plaintiff's property was seized and sold. *Held*, that the plaintiff is entitled to maintain an action of trover for his property, since plaintiff had demanded the same and been refused, and it was defendant's duty to protect plaintiff's goods from being taken for rent due by him. *Swartz v. G.-B.-S. Brewing Co.*, 393.

TROVER—Continued.

2. *Held*, further, the measure of damages is the value of the goods at the time of the conversion, and in this case, the amount the goods sold for at auction under the distress proceedings is sufficient evidence of such value as against the defendant. *Ibid.*

TRUSTS AND TRUSTEES.**1. Powers of substituted trustee.**

When a power of sale is given by will to testamentary trustees, and the survivor of them, and the heirs and assigns of the survivor, the power is annexed to the office of trustee, and may be exercised by a substituted trustee appointed upon the death of all of the testamentary trustees. *Dodge v. Dodge*, 164.

2. If various powers are given to a testamentary trustee, most of which are annexed to the office, but some of which give a personal discretion to the trustee, then a substituted trustee is authorized to execute those powers which are not personal in their nature. *Ibid.*

3. Disclaimer by heir of trustee.

When a will conveys an estate to trustees, and the survivor, and the heirs of the survivor, and upon the death of the surviving trustee, his heir unites in a suit asking for the appointment of a new trustee, that is in effect a renunciation or disclaimer of the trust by him. *Ibid.*

4. Appointment of non-resident.

A non-resident of the State may, in the discretion of the Court, be appointed a trustee to carry out the provisions of a will, upon the death of the testamentary trustee. *Ibid.*

5. Exceptions to trustee's sale.

When a trustee's report of sale alleges that the sale was for the advantage of all the parties in interest, and was made with their consent, it is no ground of objection to the ratification of the sale that the report fails to allege, or that there was no evidence to show, that the sale would be to the advantage of unborn persons who might, if they came into being, have an interest in the proceeds of sale. *Ibid.*

See MORTGAGES, 14, 17.

WAIVER.**1. Non-enforcement of claim.**

The mere fact that one has not enforced payment of a claim

WAIVER—Continued.

made by him for services rendered is not evidence that he had waived or abandoned the claim. *Richardson v. Anderson*, 641.

See CARRIERS, 15.

CORPORATIONS, 7.

WAREHOUSEMEN.**1. Burden of proof as to negligence.**

When goods entrusted to a warehouseman for safekeeping are returned in a damaged condition, the burden of proving that the damage was caused by the bailee's negligence is upon the bailor in an action by him; and it is not to be presumed as matter of law from the fact of damage. But it is not necessary for the bailor to show specific acts of negligence causing the damage. It is for the jury to determine from all the facts of the case whether negligence should be inferred, when such facts are legally sufficient to justify the inference. *Refrigerating Co. v. Kreiner*, 361.

2. In an action to recover damages for injury caused to dressed poultry stored in defendant's cold storage warehouse, the question of defendant's negligence should be submitted to the jury when there is evidence to the effect that the defendant's cellar and ice box were not properly constructed; that the ice box was not water-tight, as well as air-tight; that there was a crevice under the door which allowed water from a broken main to run into the freezer, and that there was no drain pipe leading from the cellar to carry off water. *Ibid.*

3. Damage to poultry in cold storage cellar—Evidence—Instructions.

In an action against a warehouseman to recover damages for alleged negligence in the custody of poultry stored for plaintiff in defendant's refrigerator cellar, evidence is not admissible to show that other poultry stored by defendant for plaintiff on previous occasions had kept for some months in a good condition; but since such evidence works no injury to the defendant its admission is not reversible error. *Ibid.*

4. The defendant offered evidence to show that the damage to plaintiff's poultry, stored in defendant's cellar, was caused by the bursting of a city water main which flooded the cellar; that such an occurrence had not happened before for sixteen

WAREHOUSEMEN—*Continued.*

years, and defendant contended that it was not bound to provide against such an accident. The plaintiff proved that defendant's cellar was not properly constructed, and that if it had been, the bursting of the main would not have caused the injury. *Held*, that under these circumstances, defendant is not entitled to have the jury instructed that if they find that the poultry was delivered to plaintiff in damaged condition, and that such condition was caused by the bursting of a city water main, the burden is on the plaintiff to show that there was negligence on the part of the defendant which caused the damage. *Ibid.*

WILLS.

1. Caveat—When executor not necessary party to proceeding—Petition alleging verdict of jury under caveat to be result of collusion.

The executor named in a will is not a necessary party in his individual capacity to the trial of issues under a caveat filed to the will before the probate thereof, but he is a proper party, and has the right to be made a party to the proceedings if he desires to defend the will. *Pleasants v. McKenney*, 277.

2. An administrator *pendente lite*, appointed after the filing of a caveat to a will, is not a necessary party to the trial of the issues under the caveat. *Ibid.*
3. Under a caveat filed to a will offered for probate, the executor named therein was made one of the caveatees, and answered the petition for the caveat denying its allegations relating to the *factum* of the will. Subsequently, the caveators filed an order dismissing the caveat as against the executor. Some months afterwards, issues under the caveat were sent to a Court of law for trial, and the verdict of the jury was that the will had been revoked after its execution. The executor then filed a petition alleging that the trial of the issues had been had without any notice to him; that he was a necessary party; that there had been no real contest, but the proceedings were the result of collusion, and he prayed that the verdict be not acted upon. These allegations were denied by the respondents, but no testimony was taken to support either the petition or the answer. From an order of the Orphans'

WILLS—Continued.

Court dismissing this petition and refusing probate of the will in accordance with the verdict of the jury, this appeal was taken. *Held*, that since the petition does not allege that the verdict was obtained by fraud, and does not set forth the particulars of the collusion alleged, and since the executor made no effort to be reinstated as a party to the proceedings under the caveat after his dismissal therefrom, he is not now entitled to impeach the finding of the jury. *Ibid*.

See DEVISE AND LEGACY.

WITNESS.**1. Evidence to discredit.**

Evidence is admissible to discredit a witness by showing that he had made statements as to material facts in conflict with his testimony at the trial. *Lanasa v. State*, 602.

2. To corroborate.

When the testimony of a witness as to certain facts has been contradicted, he cannot be corroborated by evidence in rebuttal showing that thirty-nine days after the happening of the event testified to, he made statements, not under oath, similar to his testimony. *Ibid*.

See APPEAL, 22.

EVIDENCE, 23.

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